Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

GEORGE L. GAUNT and THE CENTER FOR REPRODUCTIVE MEDICINE, P.A.,
Petitioners,

vs.

DONALD E. PITTAWAY, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR and THE NALLE CLINIC,
Respondents.

Petition for a Writ of Certiorari to the North Carolina Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the North Carolina Court of Appeals erred by affirming the trial court's grant of partial summary judgment to respondents, thus improperly fixing petitioners' status as limited-purpose public figures under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)?

2. Whether the North Carolina Court of Appeals erred by improperly applying the holdings of Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) and New York Times Co. v. Sullivan, 376 U.S. 254 (1964) in order to determine that the defamatory statements at issue were constitutionally protected "opinions" not susceptible to a factual determination, and by finding, alternatively, that no "actual malice" had been shown by petitioners, thus affirming the trial court's grant of summary judgment on petitioners' claims of defamation, and thereby extending constitutional protection to respondents' defamatory statements?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the North Carolina Court of Appeals were: George L. Gaunt and The Center for Reproductive Medicine, P.A. (the "Center"). The Center is a North Carolina professional association; it has no parent company and no publicly held company holds any ownership interest in it. The respondents are Donald L. Pittaway, Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, Carolyn B. Coulam, Morgan D. Gainor, Charles J. Gainor and The Nalle Clinic.

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GEORGE L. GAUNT and THE CENTER FOR REPRODUCTIVE MEDICINE, P.A.,
Petitioners,

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DONALD E. PITTAWAY, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR
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PETITION FOR A WRIT OF CERTIORARI

Petitioners George L. Gaunt ("Dr. Gaunt") and The Center for Reproductive Medicine (the "Center'), who were plaintiffs below, hereby petition this Court for a writ of certiorari to the North Carolina Court of Appeals.

OPINIONS BELOW

The trial court's orders are unpublished and appear at Appendix C. The original opinion of the North Carolina Court of Appeals ("Court of Appeals") is reported at 135 N.C. App. 442, 520 S.E.2d 603 (1999) ("Gaunt I") and appears at Appendix A. The opinion by the Court of Appeals on rehearing is

reported at 139 N.C. App. 778, 534 S.E.2d 660 (2000)("Gaunt II") and appears at Appendix B.

JURISDICTION

The Supreme Court of North Carolina entered its order denying petitioners' notice of appeal (constitutional question) and petition for discretionary review on December 28, 2000. Appendix D. Petitioners then timely petitioned the North Carolina Supreme Court for a writ of certiorari, which petition was denied by order entered April 11, 2001. Appendix D. This petition is, accordingly, filed within the time allowed by law. Supreme Court Rule 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Due Process Clause of the United States Constitution, Amendment XIV, § 1, provides in relevant part:

> . . . [n]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case stems from a series of interviews that took place from 1990 to 1991 between the above-captioned respondents and a newspaper reporter employed by The Charlotte Observer ("Observer") named Karen Garloch

("reporter Garloch"). Respondents, are, in the main, doctors who were in direct competition with Dr. Gaunt and the Center in the field of infertility medicine during the relevant period (these doctors will be referred to as the "respondent doctors"). The respondent doctors, while in the process of setting up a rival fertility clinic in Charlotte, North Carolina, made numerous accusations against Dr. Gaunt to the Observer on a wide range of issues. Generally speaking, the respondent doctors told the Observer that Dr. Gaunt had engaged in criminal and other wrongful acts detrimental to his fertility clinic patients. For instance, when reporter Garloch was asked at her deposition: "Did Dr. Crain tell you that Dr. Gaunt was cheating people," she replied, "[t]hat's what my notes say." During the course of their interaction with Observer reporter Garloch, respondents further falsely accused Dr. Gaunt of being:

- a "child molester;"
- "not very emotionally sound;"
- a taker of "kickbacks;"
- the "Jim Bakker of medicine;"
- a doctor who "never graduated - been to Yale [medical school];"
- "[t]his man is nuts;"
- an insurance defrauder;
- "canned at Mercy [Hospital];"
- "so dishonest . . . [t]he credibility of this person is nonexistent;"
- "an absolute criminal;"
- "'[k]icked out' of a pathology residency at the Mayo Clinic;"
- responsible for a "dead cat [with a] noose around its neck."

Respondents further denounced Dr. Gaunt by stating that he had engaged in "misrepresentations" and "excessive charging" and that he was "stealing from" patients. In describing Dr. Gaunt's treatment of one patient, respondent Dr. Jack L. Crain ("respondent Crain") stated that Dr. Gaunt had "let the cancer fly [with a patient] – when the real issue was staying alive." Respondent Dr. Daniel B. Whitesides ("respondent Whitesides") also accused Dr. Gaunt of gross malpractice for having missed a tumor in a patient, despite the fact that he possessed medical records reflecting that the cancer had been identified and that the patient had been appropriately referred to an oncologist by Dr. Gaunt.

On September 15, 1991, North Carolina's largest newspaper, The Charlotte Observer, published a Sunday Edition, front-page story (the "Story"), focusing on Dr. Gaunt's practice of infertility medicine at the Center. Both Dr. Gaunt and the Center were located in Charlotte, North Carolina. The respondent doctors were the primary sources for the Story. The Story was entitled "Miracle Baby Attempts Raise Questions." The Gaunt I court stated that "[t]he [S]tory was about infertility treatment, with special emphasis on in vitro fertilization and the type of medical training expected of physicians performing that procedure. The [S]tory focused on Plaintiffs George L. Gaunt . . . and the Center for Reproductive Medicine." Id., App. A at 2a. This description of the Story, like the Court of Appeals' description of the evidence in the record before it, was only partially accurate.

The Story, and the statements made by the respondent doctors in furtherance of the Story, went far beyond an analysis of Dr. Gaunt's credentials to practice infertility medicine. Although it omitted some of the respondent doctors' accusations, the Observer Story nonetheless accused Dr. Gaunt of criminal conduct, incompetence, and predatory economic

behavior toward his patients. The statements published in the Story included the following:

- Fertility doctor lacks credentials, say some experts;
- Others say he and his Center for Reproductive Medicine take advantage of infertile couples desperate for a baby;
- Doctors who specialize in helping women become pregnant say Gaunt lacks appropriate training and does unnecessary tests on couples;
- Dr. Donald Pittaway . . . believes Gaunt is taking advantage of infertile couples;
- Pittaway says he found a pattern: Patients routinely underwent expensive tests that Pittaway says weren't all necessary;
- Ninety-seven percent [of Gaunt's patients] are getting testing that they don't need.

The discovery in this case is replete with statements such as these, which were repeated and corroborated throughout the record before the trial court and the Court of Appeals.

All of this evidence was presented to the trial court in opposition to respondents' motions for partial summary judgment. The trial court's orders plainly state that the entirety of the record, including these statements, *were considered* as part of the limited-purpose public figure determination. App. C at 19a-21a. At various times in the appeals below, respondents claimed that only the statements appearing in the Story had been litigated. This assertion is totally belied by the record. All of the statements made to reporter Garloch were

the subject of motions, deposition testimony and other discovery. The fact that the statements even existed was revealed through discovery.

The statements listed above, such as calling Dr. Gaunt a "child molester," provided the impetus for the sensationalistic Story. Respondents characterized the Story, "Miracle Baby Attempts Raise Questions," as "deal[ing] primarily with two issues:

- Excessive and unnecessary testing by Dr. Gaunt and the Center for Reproductive Medicine;
- The lack of qualifications of Dr. Gaunt and the physicians at the Center for Reproductive Medicine."

Petitioners' liability theory against the respondent doctors was premised upon all of the statements they made to the Observer. Some of these statements were published verbatim in the Story, some were paraphrased, and some appeared only in Observer reporter Garloch's notes and records (which were "published" to persons inside and outside of the Observer). In the Story, the Observer audience was told that petitioners were criminally predatory charlatans "tak[ing] advantage of infertile couples desperate for a baby." Observer readers were also informed that its sources had inside knowledge and great credibility. Dr. Gaunt's career was effectively destroyed by respondents' accusations - made to the largest newspaper in North Carolina.

Because Dr. Gaunt and the Center were improperly classified as limited-purpose public figures, each of the defamatory statements described *supra* was given unfounded constitutional protection by the trial court and the North

Carolina Court of Appeals. Thus, the decisions below pivoted primarily on the trial court's summary determination that petitioners were limited-purpose public figures with respect to each of the statements at issue. This judicial determination triggered the New York Times actual malice standard, which the trial court determined, through summary judgment, petitioners had failed to meet. Petitioners have contended throughout the litigation that Dr. Gaunt and the Center could not possibly be limited-purpose public figures under Gertz, and that, therefore, the New York Times standard was misapplied. Both the Gertz and New York Times issues were heard and decided by the trial court and Court of Appeals, making this petition one properly suited for this Court.

In support of their assertion that Dr. Gaunt was a limited-purpose public figure, respondents relied primarily upon a notebook which contained one-hundred and two (102) exhibits (a summary of the "Notebook Exhibits" is located at Appendix E) and excerpts from the deposition of William Ballenger, who had assisted the Center with advertising and publicity. Not a single one of respondents' Notebook Exhibits - except Exhibit No. 1, which was the Story at issue - showed Dr. Gaunt articulating any public position regarding the appropriateness of his credentials. Respondents simply presented the court with examples of Dr. Gaunt appearing on the radio or in other local Charlotte media (for reasons completely unconnected to credentialing), privately writing elected politicians or officials from medical organizations on various infertility issues (none of these letters was ever made public), utilizing a public relations agent to advertise and gain publicity for the Center, and hiring a lobbyist to track legislation that had been proposed in the North Carolina General Assembly (which involved requiring health insurance companies to reimburse their enrollees for infertility

treatments).[1] Respondents cannot point to one single occasion where Dr. Gaunt appeared in a public forum - by himself or through a surrogate - to argue about the credentials a fertility doctor should possess.

Even so, the Court of Appeals asserted that respondents' evidence supported limited-purpose public figure status, since it demonstrated that Dr. Gaunt had "wr[itten] several politicians, hired a personal lobbyist, and procured the services of a public relations agent to enhance his public image." Gaunt II, App. B at 17a-18a. The Court of Appeals then concluded that Dr. Gaunt had "thrust himself to the forefront of the controversy" by "*provid[ing] the Observer with his side of the debate.*" Gaunt II, App. B at 17a (emphasis added). No attempt was made by the Court of Appeals or the trial court to determine whether any of Dr. Gaunt's actions, other than his rebuttal comments in the Story itself, were related to a controversy over fertility doctor credentials, or whether Dr. Gaunt had actually and publicly participated in any such controversy. In fact the evidence showed just the opposite.

A cursory examination, and several examples, illustrate, fairly, the irrelevance of each of the one-hundred and two (102) Notebook Exhibits respondents used to establish petitioners as limited-purpose public figures. The exhibits fell into roughly six categories. Exhibits one through twenty-four consisted of articles in local newspapers, a copy of the Center's newsletter (circulated to patients and potential patients), and news releases related to births at the Center. None of these

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[1]This proposed legislation never made it out of committee and received no media coverage whatsoever. Respondents presented no evidence that this legislation was ever covered by the media, and similarly, there was no evidence that Dr. Gaunt or anyone from the Center ever spoke publicly about any aspect of it.

exhibits - which are the only instances presented where Dr. Gaunt and the Center appear publicly - contained any mention of a "fertility-credentials debate." Exhibits twenty-five through thirty-three consisted of advertisements for the Center in the Observer, the Yellow Pages, and similar print-media outlets (a total of only eight such advertisements). None of these advertisements contained a single sentence related to any debate about fertility credentials. Exhibits thirty-four to fifty-two consisted of invoices from Mr. Ballenger's marketing firm; none of these invoices reflected any marketing work for the Center or Dr. Gaunt related to a fertility debate or controversy. All of the invoices reflected publicity gained for topics such as "overcoming tubal ligation."

Exhibits fifty-eight and fifty-nine were affidavits from the Center's lobbyist (which, *inter alia*, affirmed that Dr. Gaunt never appeared before any public audience) and from a reference librarian authenticating the insurance reimbursement bills involving fertility that had been proposed in the North Carolina legislature. Exhibits sixty through seventy-eight consisted of articles from magazines such as People and Forbes, each of which discussed topics related to fertility - none of which even mentioned petitioners. Exhibits seventy-nine through one-hundred and two consisted generally of letters from Dr. Gaunt to four of his elected representatives (and to United States Representative Ron Wyden of Oregon) and to officers of fertility-oriented medical organizations. These letters, generally speaking, encouraged their recipients to oppose any restrictions that would limit the practice of fertility medicine to only those doctors having a sub-specialty in reproductive endocrinology (a credential Dr. Gaunt did not possess). There is no evidence in the record that any of these letters were ever read by anyone other than their recipients. None of these letters were ever written as "letters

to the editor," and none of them ever surfaced in a public forum.

Specific examples of the Notebook Exhibits make the point even more clearly. Respondents' Notebook Exhibit No. 6, was a letter to the editor by Dr. Gaunt which ran in the Observer in 1987; it was entitled "Right To Smoke Harms Others." This letter did not mention fertility medicine. Instead the letter addressed dangers associated with passive or second-hand cigarette smoking. Notebook Exhibit No. 4, another Observer article, was entitled "Mother's Day Can Be Tough For Those Without Children," and similarly failed to mention Dr. Gaunt. This "Mother's Day" article included comments by Center employees about an infertile couple's desire to have children. Notebook Exhibit 12 was an article from the Observer entitled "Test-Tube Twins Born in Stanly," and it simply announced the birth of two babies conceived through in vitro fertilization at the Center. Respondents' Notebook Exhibit No. 5, entitled "Scholarship Funds for Nursing," ran in the local university newspaper and included Dr. Gaunt's photograph, noting Dr. Gaunt's contribution of a $300.00 nursing scholarship to a student. As made evident from their titles, none of these articles carried a hint that a fertility credentials controversy allegedly existed, and Dr. Gaunt expressed no views about a credentials debate in any of them.

The advertisements for the Center, asserted as probative of the limited-purpose public figure issue by respondents, similarly failed to contain any comment about a fertility credentials debate or controversy. Instead, out of the eight so-called advertisements, one was simply the announcement of the Center's association of a reproductive endocrinologist; the rest of the advertisements carried statements such as:

> A Commitment to Excellence In the Resolution of Infertility: Our team approach to infertility blends the best of science and medicine to provide state-of-the-art infertility care for childless couples. We performed Charlotte's first successful *in vitro* fertilization and continue to lead in the field of technology and laboratory services. We understand that infertility is a life crisis and provide answers to help couples deal with their feeling of frustration, anxiety and loss.

Respondents also presented the Court with billing records from the Center's advertising and public relations agent, Mr. Ballenger. One of Mr. Ballenger's bills to the Center, which was contained in respondents' Notebook as Exhibit No. 34, was for publicity garnered for the Center following the announcement of the "Charlotte area's initial in-vitro success." Another bill reflects Mr. Ballenger's efforts to "publicize arrival of Cambodian triplets." Yet another bill, Notebook Exhibit No. 39, was "[f]or public relations support, publicity, and counseling, with especial support and research to raise public awareness of male infertility problems." None of the publicist's bills reflected one iota of work to promote petitioners' views about fertility medicine credentials. At no time did Dr. Gaunt appear in any public venue to argue any point related to his credentials as a fertility doctor, other than to defend himself against the accusations made in the Story at issue.

In April of 1989, separate bills (the "bills") were proposed in the North Carolina State Senate entitled: (1) "An Act to Provide That The State Employees' Comprehensive Major Medical Plan Provide Benefits for the Treatment of Infertility . . . .," and, (2) "An Act to Provide That Health

Insurance Policies . . . Provide Coverage for the Treatment of Infertility." At the time these bills were proposed, Dr. Gaunt had one of the few infertility practices in North Carolina. Both bills would have regulated the degree to which infertility care would be a reimbursable health insurance expense. Accordingly, Dr. Gaunt had a financial and professional interest in the progress of each bill as they progressed through the North Carolina legislature. So, Dr. Gaunt hired a lobbyist to track this legislation; his name was Steven Meehan. The legislation received no publicity and died a quiet death in committee. Dr. Gaunt's role in the whole affair was silent and unseen.

In 1990, a state legislative commission looked again at the bills, but according to Meehan, "the issue [wa]s dead." It is true that, in some private letters related to the bills, such as to Richard K. Kleppinger, M.D., of the Women's Clinic, Ltd. in West Reading Pennsylvania, Dr. Gaunt made comments such as these:

> Thank you for forwarding to me a copy of your September 1989 letter to Dr. Younger, President of the American Fertility Society. I believe that our efforts did have an effect on the new "minimal standards" developed by the American Fertility Society and on legislation considered by Representative Wyden. Thus far my colleagues and I have prevented passage of legislation in North Carolina restricting insurance payment for IVF [in vitro fertilization] to programs employing a reproductive endocrinologist.

In another similar letter, dated April 21, 1989, Dr. Gaunt wrote Emil Steinberger, M.D., of the Texas Institute for

Reproductive Medicine and Endocrinology, and said, in pertinent part:

> I apologize for my delay in replying to you. Soon after I received your letter I learned that a bill was being introduced in the North Carolina legislature requiring that any facility receiving insurance reimbursement for IVF or GIFT procedures be headed by a reproductive endocrinologist and be an active member of SART [Society for Assisted Reproductive Technologies]. I have been spending every spare moment to stop this lunacy.

These "Dear Colleague" letters reflected Dr. Gaunt's interest in and concern about professional developments in his field and the generalized mutual concerns of a number of doctors with practices similar to his. None of these letters was ever made public. And, moreover, respondents presented no evidence that Dr. Gaunt's limited private activities ever affected any of the issues spoken of in the letters, or that anyone in the Observer audience had any idea that Dr. Gaunt was involved in such issues. Petitioners respectfully submit that this evidence falls far short of the constitutional requirements for limited-purpose public figure status.

REASONS FOR GRANTING THE WRIT: THE WRIT SHOULD BE GRANTED BECAUSE THE GAUNT I AND GAUNT II DECISIONS CANNOT BE SQUARED WITH CONTROLLING FIRST AMENDMENT PRECEDENTS.

I. Petitioners were private citizens improperly designated as limited-purpose public figures under Gertz.

A. The lower courts improperly applied constitutional "limited-purpose public figure" standards to Dr. Gaunt and the Center.

This case presented the trial court and the Court of Appeals with the problem of establishing the conditions under which a private individual, *who is not a public official*, may become a limited purpose public figure within the scope of Gertz v. Robert Welch, 418 U.S. 323 (1974). Limited-purpose public figure determinations are often outcome-determinative in defamation actions, since the private plaintiff must prove his case based upon negligence standards, whereas the limited-purpose public figure must surmount a higher standard, *i.e.*, that of "actual malice." See, e.g., Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1291-1292 (D.C. Cir. 1980).

In every jurisdiction in the country - every single one except for North Carolina under the Gaunt I and Gaunt II decisions - there are three basic things that must occur before someone can become a public figure. First, and before the defamatory words are spoken, a specific controversy must have existed directly related to those words.[2] Second,"the plaintiff[s] [must] have been the regular focus of media reports on the [identified] controversy"[3] and must have mounted a public "rostrum to advocate [their] particular view[s]" at the "forefront" of the debate.[4] And third, petitioners can only be

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[2]Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 688 (4th Cir. 1989); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); Foretich v. Capital Cities, 37 F.3d 1541, 1553 (4th Cir. 1994); Waldbaum, 627 F.2d at 1298.

[3]Wells v. Liddy, 186 F.3d 505, 540 (4th Cir. 1999); Wolston v. Reader's Digest Ass'n., 442 U.S. 157, 167-168 (1979).

[4]Wolston, 442 U.S. at 167-168; Hutchinson, 443 U.S. at 135.

"public figure[s] with respect to those statements that are directly relevant to [their] involvement in the identified controversy."[5]

"A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." Wolston, 442 U.S. at 167. It is the mandate of the courts to look at *each* allegedly defamatory statement and to decide whether it merits constitutional protection. Either each defamatory statement merits protection under the First Amendment, or it does not. The Gaunt I and Gaunt II courts failed to properly apply these constitutional standards. Fundamental fairness and justice require a correction of the lower courts' errors.

1. No showing has ever been made that the Observer readership considered Dr. Gaunt to be at the forefront of any pre-defamation "credentials controversy."

Prior to publication of the Story, petitioners never participated in any alleged "fertility doctor credentials controversy." There is no evidence that Dr. Gaunt ever argued about "fertility credentials" before any public audience. Therefore, it would have been impossible for Observer readers to have associated him with any such debate. Respondents were required to present evidence of Dr. Gaunt's central and public participation in the alleged "debate" about fertility credentials, but they did not.

Throughout most jurisdictions, there exists a requirement that a limited-purpose public figure must have

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[5]Blue Ridge Bank, 866 F.2d at 688; Foretich, 37 F.3d at 1553; Waldbaum, 627 F.2d at 1298.

engaged in the relevant public debate before the audience "where the defamation was published." Waldbaum, 627 F.2d at 1295-1296 n. 22; Harris v. Tomczak, 94 F.R.D. 687, 702 (E.D. Cal. 1982). Similarly, "a plaintiff should not be considered a limited-purpose public figure *absent the existence of a pre-defamation public controversy* in which the plaintiff has become *directly* involved . . . the plaintiff is a public figure with respect to [only] those statements that are *directly relevant to its involvement in the identified controversy.*" Blue Ridge Bank, 866 F.2d at 688 (emphasis added); see also Waldbaum, 627 F.2d at 1295 n.19 ("[t]he court must examine these factors as they existed before the defamation was published")(citing Hutchinson, 443 U.S. 111).

There is not one shred of evidence in the record indicating that petitioners (either or both of them) were associated with a pre-defamation "credentials" controversy in the area served by the Observer or anywhere else. Even Mary Newsom, the Observer editor who supervised the investigation of petitioners, and the Story which arose therefrom, failed to associate petitioners with any pre-publication "credentials" debate. At her deposition, editor Newsom put it plainly:

> Q. Can you recall when you first heard anything about Dr. George Gaunt?
>
> A. I don't remember ever hearing the name in such way that I remembered it until Karen [Garloch] began working on the story we're talking about.

Needless to say, if the Observer editor overseeing the investigation and Story was unfamiliar with Dr. Gaunt, certainly the same can be said about the audience served by

her newspaper. See Arctic Co. v. Loudon Times, 624 F.2d 518, 521 (4th Cir. 1980)(newspaper's knowledge of plaintiff's identity relevant to public figure analysis).

It is also well-settled that one "cannot be deemed a limited-purpose public figure merely because he or she makes reasonable public replies to [] accusations." Foretich, 37 F.3d at 1559-1564; cf. Hutchinson, 443 U.S. at 135. Despite these strictures, the Court of Appeals proceeded to find Dr. Gaunt a public figure in part because he had rebutted the accusations made against him:

> [I]t is clear that Gaunt thrust himself into the vortex of the controversy . . . [he] also provided The Charlotte Observer with his side of the debate.

Gaunt II, App. B at 17a. This was patent error, exemplary of the other errors present in the Court of Appeals' First Amendment analysis.

2. Dr. Gaunt's prior and limited participation in public activities was wholly unrelated to any "credentials controversy," placing him squarely within the Gertz fact pattern.

It is true that petitioners did periodically seek out and receive media attention. This was done by Dr. Gaunt in order to promote, generally, the services provided by his clinic. However, on each of these occasions - every single time - there was no argument or debate about the credentials needed to operate a fertility clinic. This is a paramount point, because respondents presented the trial court with examples of the media coverage received by petitioners, as evidence of their "public figure status." For instance, the Gaunt II court made

much of the fact that Dr. Gaunt had "wr[itten] to several politicians, hired a personal lobbyist, and procured the services of a public relations agent to enhance his public image." Gaunt II, App. B at 17a. The flaw in this logic is that none of these actions by Dr. Gaunt had anything to do with participation in any "credentials controversy." As a result, these actions were improperly considered as factors by the Gaunt II court in the "limited-purpose public figure analysis."

As shown most directly by Gertz, 418 U.S. at 351-352, just because someone is, "[like Elmer Gertz was,] an officer of local civic groups and of various professional associations, and [] has published several books and articles," he is not necessarily a limited-purpose public figure with respect to a particular controversy. In Gertz, the plaintiff sought to recover against the publisher of a magazine article that described him as a "Leninist" and a "Communist-fronter." Id., 418 U.S. at 326. The Gertz opinion reflects that, at the time the defamatory statements were leveled against him, Elmer Gertz "had long been active in community and professional affairs . . . and he ha[d] published several books and articles on legal subjects." Id., 418 U.S. at 351-352. However, because plaintiff Gertz's activities in the public eye had no direct nexus with the defamation at issue, the Gertz Court stated: "[Plaintiff Gertz] did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." Gertz, 418 U.S. at 354.

The Gertz Court, as opposed to the Gaunt I and II courts, appropriately distinguished between Elmer Gertz's public notoriety in the legal field from the subject matter of the defamatory remarks made against him. In this case, however, no such distinction was made by the lower courts with respect to Dr. Gaunt and the Center. Like the respondents in Gertz, the trial court and the Court of Appeals classified Dr. Gaunt

and the Center as limited-purpose public figures simply because they were periodically in the press - for reasons completely unconnected to "fertility clinic credentials." This determination was constitutionally unsound, as defined by the opinions of this Court.

Privately writing members of Congress, tracking proposed legislation, and hiring an advertising firm to solicit business are activities engaged in by many professionals, such as attorneys and accountants. Dr. Gaunt's "activities and public profile are much like those of countless members of his profession," and therefore, are not of the type or character sufficient to classify him as a limited-purpose public figure. Hutchinson, 443 U.S. at 135. This case is, upon inspection, directly analogous to Gertz and in many pertinent respects, to Hutchinson. Unfortunately, the Gaunt I and II decisions did not follow the law applied to the similar facts of Gertz.

Respondents' evidence, which the Court of Appeals accepted, did not attempt to show that "the plaintiff[s] ha[d] been the regular focus of media reports on the [identified] controversy." Wells, 186 F.3d at 540. Because no one can point to a single action by petitioners, known to the Observer audience, where Dr. Gaunt meaningfully participated in an argument over "fertility doctor credentials," his media exposure was no more relevant than the pre-defamation media exposure of plaintiff Gertz. The Court of Appeals simply assumed, despite plenary authority to the contrary, that if you receive media attention on any subject, you are a limited-purpose public figure. This Court should not allow such an unjust ruling to stand as precedent in North Carolina when it so directly contradicts the decisions of this Court.

3. Publicity unrelated to the "fertility credentials controversy" cannot support the

conclusion that petitioners are limited public figures.

Two examples are typical of the evidence tacitly relied upon by the trial court and by the Court of Appeals. The first example is a letter to the editor by Dr. Gaunt which ran in the Observer in 1987 entitled "Right' To Smoke Harms Others." This letter addressed the dangers of passive cigarette smoking. Credentials were not even mentioned. The second example is an Observer article entitled "Mother's Day Can Be Tough For Those Without Children." This article addressed the obvious, and included comments by Dr. Gaunt's employees about an infertile couple's desire to have babies. The article did not even mention Dr. Gaunt. Even so, the Court of Appeals implicitly agreed with respondents that this coverage supported the limited-purpose public figure determination. This was error.

Respondents cannot point to one single example of media coverage in the record - other than in the Story at issue - where petitioners articulated a public position regarding the appropriateness of Dr. Gaunt's credentials. It is true that Dr. Gaunt wrote a handful of letters to legislators in North Carolina regarding insurance reimbursement issues related to fertility. Dr. Gaunt also wrote former Charlotte congressman J. Alex McMillan regarding hearings on infertility issues being conducted by the United States Congress in 1989. These letters are in the record, and although some of these letters reflected Dr. Gaunt's position on fertility issues, none of them received any media coverage whatsoever. Importantly, Dr. Gaunt never testified before any regulatory or governmental committee about fertility credentials, nor has he ever met with any governmental official regarding the same.

These letters, and the others like them, were completely unknown to readers of the Observer. And so it was impossible

that these letters could have served to thrust Dr. Gaunt to the forefront of any credentials controversy. Since respondents have failed to show that anyone knew about these letters - other than their recipients - they could not have been probative of whether petitioners were public figures. Even so, the Gaunt II court made it clear that it regarded the letters as dispositive evidence. See Id., App. B at 17a. This was plain and prejudicial error.

Of similar ilk is the Court of Appeals' fixation on the bare facts that Dr. Gaunt had "hired a personal lobbyist, and procured the services of a public relations agent to enhance his public image." Gaunt II, App. B at 17a. The Court of Appeals found that these actions made it "clear that Gaunt thrust himself into the vortex of the controversy." Id. While stating this, the Gaunt II court never connected Dr. Gaunt's hiring of a publicist or lobbyist to his participation in a "credentials controversy." This is because the hiring of both of these persons occurred to promote the Center's general fertility services, not to participate in or facilitate a public debate over credentials. The blurred reading of the law and the rote generalizations made by the Gaunt II court reveal that it did not look to see why the publicist or the lobbyist was hired, or what each of them actually did for Dr. Gaunt and the Center.

As shown by the record, Dr. Gaunt's public relations agent garnered press coverage for petitioners through events such as the:

- announcement of the "Charlotte's area's [sic] initial in-vitro success,"
- "arrival of Cambodian triplets,"
- announcement of Dr. Gaunt's contribution of a $300.00 nursing scholarship to a local student.

There are other examples, but each reveals the same point. None of this publicity had anything to do with a "credentials controversy." The Court of Appeals' cursory conclusion that the hiring of a publicist *ipso facto* makes someone a limited-purpose public figure is untenable.

The same considerations apply to the lobbyist. The Court of Appeals made much of Dr. Gaunt's hiring of a "personal lobbyist." Gaunt II, App. B at 17a. Dr. Gaunt did, in fact, hire a lobbyist to track legislation that was before the North Carolina legislature concerning insurance reimbursement for fertility treatment. This potential legislation attracted no media coverage and died a silent death in a state legislative subcommittee. Thus, Dr. Gaunt's "hiring of a lobbyist" could have had no relevance to the public figure question - when analyzed in the proper context under Gertz and its progeny.

Dr. Gaunt's public relations agent, Mr. Ballenger, described the lobbyist's work as thus:

> Q. Earlier today, you answered quite a few questions about work that [lobbyist] Steve Meehan had done concerning tracking a bill or bills in the North Carolina legislature. To your knowledge, was Dr. Gaunt's name ever used in a public debate or discussion concerning this legislation?
>
> A. *Not to my knowledge.*
>
> Q. To your knowledge, did it ever appear in print media, or TV, radio, et cetera, concerning this legislation?

A. *Not to my knowledge.*

(Emphasis added). As is evident, each "public-figure" factor enumerated by the Gaunt II court was improper under such controlling and/or authoritative precedents as Gertz, Hutchinson, Wells, and Waldbaum. The Gaunt II court committed the same error the trial court did in Gertz, equating the mere existence of publicity or public attention with public figure status. In other words, the Gaunt I and II courts did not apply controlling law to the particular facts of this case.

4. Likewise, petitioners never obtained any "position of great influence within the controversy . . . to substantially affect others" as mandated by the Courts interpreting Gertz and its progeny.

Given the above analysis, it is almost a redundancy to state that petitioners never "assumed a role of special prominence in the . . . public controversy." Wells, 186 F.3d at 534 (citation and internal brackets omitted); Wolston, 443 U.S. at 167-68. It naturally follows that, because the relevant public had no idea who Dr. Gaunt was, and because Dr. Gaunt never took a public position regarding "credentials," it was error to hold that he was a public figure. "The language of Gertz is clear that plaintiffs must have 'thrust themselves to the forefront' of the controversies so as to become factors in their ultimate resolution . . . . They must have achieved a 'special prominence' in the debate." Waldbaum, 627 F.2d at 1297 (quoting Gertz, 418 U.S. at 351).

Prior to the publication of the Story at issue, which cannot be considered as a factor in the public figure analysis, petitioners took no public position before the Observer

audience on credentials issues (or any other relevant debate, for that matter); petitioners' name was not associated with such issues by the media or otherwise; and Dr. Gaunt made no comments regarding any so-called "credentials controversy" (other than in the Story itself). As a result, there is no rational basis to maintain that he held a "special prominence" in any debate, or that he was at the "forefront" of it. Dr. Gaunt may have written private letters (even to public people), or tracked legislation, so as to participate in events that affected his livelihood, but that participation was unknown to the only audience that matters in this constitutional analysis, i.e, the audience served by the Observer.

And, it should be said, Dr. Gaunt's activities differ little from the conduct of many lawyers and law firms, who regularly write letters to elected representatives and bar associations, and who may even advertise their services. These activities cannot be separated from regular participation in commerce, or from the "Dear Colleague" or "Dear Congressman" letters many people write when they are concerned about an issue that affects them. These actions do not elevate the actor to public figure status, absent any significant participation in a relevant debate. Otherwise, nearly everyone meets the Gertz definition of a limited-purpose public figure, at least in North Carolina's courts.

5. The defamatory statements lack the constitutionally mandated connection to the controversy at issue, and were not considered separately and independently as required.

There must be a natural connection between the defamatory statements and petitioners' participation in the controversy. Gertz, 418 U.S. at 343; Waldbaum, 627 F.2d at 1298. Thus, petitioners can only be "public figure[s] with

respect to those statements that are directly relevant to [their] involvement in the identified controversy." Blue Ridge Bank, 866 F.2d at 688. Statements unrelated to the specific controversy at issue do not receive constitutional protection. Waldbaum, 627 F.2d at 1298. The Court of Appeals flatly failed to follow this well-recognized and generally accepted constitutional requirement.

Accusations that Dr. Gaunt was a "child molester," that he was responsible for a "dead cat," that he was an "absolute criminal" engaged in insurance "fraud," and that he had engaged in assorted "kickback" schemes, have no connection with any alleged "credentials controversy." Thus, even if Dr. Gaunt could properly be considered a limited-purpose public figure as to a "credentials controversy," he should not have been so classified with respect to patently unrelated defamatory statements. Providing these unrelated statements with blanket New York Times protection cannot be squared with Gertz, Waldbaum, Blue Ridge Bank and other similar rulings, each of which require a nexus between the alleged public controversy and the defamatory statements at issue. The lack of the required connection between each of the instant defamatory statements and the alleged controversy mandated reversal of the trial court's limited-purpose public figure determination. The Court of Appeals' failure to reverse on these grounds was error.

6. The North Carolina Court of Appeals committed other prejudicial errors in contravention of settled First Amendment jurisprudence.

It is also clear that the Court of Appeals relied on general media reports about fertility treatment that post-dated the Story itself to classify petitioners as public figures. This

was patent error, since the rule is well-established that post-defamation rebuttals by the defamed party cannot be factored into the public-figure analysis. Hutchinson, 443 U.S. at 135. The Gaunt II opinion states that it determined the contours of the alleged public controversy through the content of "[s]everal . . . published articles on the debate, including Time, Newsweek . . . U.S. News and World Report . . . and The Los Angeles Times." Gaunt II, App. B at 17a. *At least six* of these articles post-dated the September 15, 1991 Story - one by over three years (December 1994). Multiple and controlling precedents dictate that this was error, since materials created after the defamatory statements have been made are irrelevant to the determination of a pre-existing specific controversy. See, e.g., Hutchinson, 443 U.S. at 134-135 (setting forth requirement that only pre-defamation events may be considered in public figure analysis); Blue Ridge, 866 F.2d at 688; Foretich, 37 F.3d at 1553; Waldbaum, 627 F.2d at 1298.

As support for its application of these articles against petitioners, the Gaunt II court cited this Court's decision in Wolston, 443 U.S. at 167. The Gaunt II court acknowledged the well-recognized "public controversy requirement" set forth in Wolston, but then called it "a requirement criticized by the lower courts and commentators." Gaunt II, App. B at 17a. The Gaunt II court may have disagreed with the Wolston holding, setting forth "public controversy" principles, but it was nonetheless bound to follow it. It did not. These errors were material and merit review by this Court.

II. The Court of Appeals erred in its application of the Milkovich "opinion" standard and the New York Times "actual malice" standard.

A. The Court of Appeals erred when it determined that the defamatory remarks by respondents were constitutionally protected under Milkovich.

The Gaunt I court[6] asserted that it had reviewed the entire record and found that "the statements made by defendants [wer]e statements of opinion affecting matters of public concern," Gaunt I, App. A at 7a-8a (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)). However, absent absurd linguistic gymnastics, the statements at issue simply cannot be dismissed as unverifiable "opinion." If accusations that Dr. Gaunt is a "child molester" and that "ninety-seven percent [of his patients] are getting testing that they don't need" are unverifiable (and thus, unactionable) statements of "opinion," then there are few statements that can be verified.

In Milkovich, the Court held that an unsupported opinion that implies defamatory facts, like "'[i]n my opinion Jones is a liar,' can cause as much damage to reputation" and may be just as actionable "as the statement, 'Jones is a liar.'" Milkovich, 497 U.S. at 19. Milkovich directs that an opinion may constitute actionable defamation, so long as the opinion can be reasonably interpreted to declare or imply untrue facts. Id., 497 U.S. at 19-20. The defamatory statements at issue went far beyond simply implying untrue facts; each of them was unequivocal and left nothing to the imagination. It is thus impossible to square the holding in Milkovich with the holding of Gaunt I.

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[6]The Gaunt II opinion stated that "[p]laintiffs' arguments concerning the trial court's granting of summary judgment to respondents on petitioners' defamation claims were determined in the prior opinion of this Court." Gaunt II, App. B at at 18a.

The instant respondents' allegations were much more outrageous, venal and scandalous than simply calling Dr. Gaunt a "liar." As well, respondents' allegations were easily verifiable. Plaintiff was either a "child molester" or he was not. Plaintiff was either an "absolute criminal" or he was not. Plaintiff was kicked out of a residency or he was not. Plaintiff performed unnecessary tests or he did not. Certainly, the question of whether "ninety-seven percent" of Dr. Gaunt's patient tests were unnecessary was an exact number, capable of being proven true or false. Dr. Gaunt categorically denied each of these accusations, and proof of their falsity was borne out in record. In sum, all the statements described herein contain "provably false connotations" and can be verified.

Two recent cases highlight the constitutional infirmity of the Gaunt I and II opinions. In Flamm v. American Association of University Women, 201 F.3d 144 (2nd Cir. 2000), the defendants maintained an attorney referral service directory for their clients that contained a short paragraph of information about each individual lawyer listed. The plaintiff attorney sued defendants, alleging that the defendants' description of him as an "ambulance chaser" was defamatory. The Flamm Court held that the "challenged statement is reasonably susceptible to the defamatory meaning imputed to it." Flamm, 201 F.3d at 153 (quotation omitted). If the derogatory phrase "ambulance chaser" is actionable, then so are the defamatory statements leveled against Dr. Gaunt.

Perhaps the case closest to the one at hand is Kanaga v. Gannett Co., Inc., 687 A.2d 173 (Del. 1996), aff'd in part, rev'd for new trial on damages, 750 A.2d 1174 (2000)(dissent cites Gaunt I as support for its criticism of prior 1996 appellate ruling reversing grant of summary judgment in favor of defendants). In Kanaga, a newspaper reported that plaintiff Kanaga, a doctor, had recommended an unnecessary

hysterectomy solely to profit from the procedure. The essence of the defamatory statement there was that Dr. Kanaga had "recommended unnecessary and inappropriate surgery." Id. at 179. In Kanaga, the court reversed summary judgment for the defendants, finding "that a reasonable jury could conclude from the entire context of that article that there was an undisclosed defamatory factual basis alleged by [the patient's] opinion." Id. The Kanaga defendant's allegations of "unnecessary testing" pale in comparison to calling Dr. Gaunt the "Jim Bakker of medicine" and an "absolute criminal."

Based on the holdings of Milkovich, Flamm, and Kanaga, this Court should reverse the holding of the Court of Appeals. If the statement "[n]inety-seven percent [of Gaunt's patients] are getting testing that they don't need" is a matter of opinion and is entitled to constitutional protection, then the protection has overtaken the cause of action itself.

B. The Court of Appeals erred in holding that petitioners failed to show "actual malice" under New York Times Co. v. Sullivan.

"Actual malice" has been defined in First Amendment cases as the publication of a statement with knowledge that it was false or with reckless disregard as to whether it was false. New York Times, 376 U.S. at 279-80. For statements against a public figure to be considered actionable, this Court has made it clear that the defendant must have made the false publication with a "high degree of awareness of . . . probable falsity," or "entertained serious doubts as to the truth of his publication." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989)(citations and internal quotation marks omitted). In determining whether the constitutional standard has been satisfied, the reviewing court must consider the record in full. Id.

Petitioners contend that the record is replete with evidence showing "actual malice" on the part of respondents. For instance, reporter Garloch's notes document that respondent Crain told her that "[Dr. Gaunt] never graduated from Yale [medical school]," even though he had told reporter Garloch he knew Dr. Gaunt's medical credentials. Respondent Crain further told reporter Garloch that Dr. Gaunt had been "kicked out of [a] path[ology] resid[ency] in Mayo." When questioned about this comment at his deposition, respondent Crain testified that he knew Dr. Gaunt had left for "something to do with family problems." When confronted at his deposition about his charges to reporter Garloch that Dr. Gaunt had engaged in criminal activity and fraud, Dr. Crain replied, "I know of no accused criminal activity that has occurred." More importantly, Dr. Crain *could not assert that these prior statements were true.*

The Court of Appeals had before it direct evidence that respondent Crain and the other respondents knew their defamatory statements were false when made. And under the circumstances, it should be assumable that a disavowed accusation of child molestation should support a finding of actual malice. Therefore, the Gaunt I court's affirmation of the trial court's entry of summary judgment could not have been proper. Surely the Court of Appeals' ruling on this issue alone presents a genuine issue of material fact - well beyond the "clear and convincing" level required to surmount summary judgment.

CONCLUSION

An individual's interest in protecting his good reputation from being falsely impugned, "the interest at the core of modern defamation law, has been carefully guarded from time immemorial." Wells, 186 F.3d at 520. See also

Rodney A. Smolla, Law of Defamation § 1.01 (1998)(citing Exodus 20:16, "Thou shalt not bear false witness against thy neighbor"). Petitioners' good reputation has been impugned, almost beyond repair, and respondents were errantly granted constitutional immunity from the consequences of their actions. Hence, this Court should grant petitioners' prayer for the writ of certiorari, so that the errors of law stated herein may be properly reviewed and set right, and so that a jury may ultimately determine the just and fair disposition of this case.

Respectfully submitted, this the 4th day of July, 2001.

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July 4, 2001

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APPENDICES

APPENDIX A

GEORGE L. GAUNT, BARBARA G. FIELDS, CENTER FOR REPRODUCTIVE MEDICINE, P.A., DONALD S. HORNER, AND DONALD S. HORNER, P.A., PLAINTIFF-APPELLANTS v. DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, AND THE NALLE CLINIC, DEFENDANT-APPELLEES

No. COA98-823

(Filed 2 November 1999)

1. Appeal and Error— preservation of issues—judgments and orders from which appeal taken

Plaintiffs' request for appellate review of orders entered prior to 24 June 1997 under N.C.G.S. § 1-278 was immediately defeated by their failure to object to the orders. Even construing plaintiffs' notice of appeal liberally, it does not give rise to any inference, reasonable or otherwise, of an intent to appeal orders issued other than the 24 June orders and judgments.

2. Libel and Slander— limited purpose public figures—statements of opinion—no malice

The trial court did not err by granting summary judgment for defendants on libel claims arising from statements in a newspaper article about a doctor and clinic where plaintiffs were limited purpose public figures who had the burden of proving actual malice. These were statements of opinion affecting matters of pubic concern; moreover, even if the statements were not matters of opinion, plaintiffs failed to show malice.

Appeal by plaintiffs from orders and judgments entered 24 June 1997 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 30 March 1999.

Wood & Francis, PLLC, by John S. Austin; Wyrick, Robbins, Yates & Ponton, LLP, by Gary V. Mauney; for plaintiff-appellants.

Jones, Hewson & Woolard, by Harry C. Hewson and Lawrence J. Goldman, for defendant-appellees Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and The Nalle Clinic.

Koy E. Dawkins, P.A., by Koy E. Dawkins, for defendant-appellee Carolyn B. Coulam.

Dean & Gibson, L.L.P., by Michael G. Gibson and John W. Ong, for defendant-appellee Donald E. Pittaway.

F. Kevin Mauney for defendant-appellees Morgan D. Gainor and Charles J. Gainor.

McGEE, Judge.

This case arose from a newspaper story entitled " 'Miracle Baby' Attempts Raise Questions" (the story), which was published in *The Charlotte Observer* on 15 September 1991. The story was about infertility treatment, with special emphasis on *in vitro* fertilization and the type of medical training expected of physicians performing that procedure. The story focused on plaintiffs George L. Gaunt (Gaunt) and the Center for Reproductive Medicine, P.A. (the Center). Defendants Jack L. Crain, Richard L. Wing and Daniel B. Whitesides, all of whom were shareholders and employees of defendant The Nalle Clinic, are infertility specialists and were interviewed for the newspaper story as to their opinions of Gaunt's expertise as an infertility specialist and his work at the Center. Plaintiffs allege that several of the statements made by defendants Crain, Wing, and Whitesides in the story, and the interviews leading up to its publication, were defamatory and constituted unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1.

Defendant Donald E. Pittaway, Director of Reproductive Endocrinology at Bowman Gray School of Medicine, was similarly interviewed for the story and made several statements regarding his opinion of Gaunt's training and expertise in the field of *in vitro* fertilization. Pittaway also made statements to the effect that, in his opinion, Gaunt made a practice of ordering tests that were unnecessary or excessive. Plaintiffs filed this action alleging these statements were defamatory and constituted an unfair and deceptive practice.

Defendants moved to dismiss plaintiffs' claims for unfair and deceptive practices pursuant to N.C.R. Civ. P. 12(c), and the trial court granted the motion on 10 May 1994. Defendants then moved for partial summary judgment pursuant to N.C.R. Civ. P. 56(c) on the issue of whether plaintiffs were public figures for purposes of the newspaper story. Plaintiffs moved to strike certain exhibits defendants offered supporting their motion for partial summary judgment. Plaintiffs' motion to strike was denied and the trial court granted defendants' motion for partial summary judgment determining plaintiffs were public figures for purposes of the story in orders entered 25

July 1995. Defendants then moved for summary judgment on plaintiffs' defamation claims. These motions were subsequently granted in orders and judgments entered on 24 June 1997. Plaintiffs timely filed a notice of appeal of the 24 June 1997 orders and judgments on plaintiffs' defamation claims.

On appeal, plaintiffs argue the trial court erred in: (1) dismissing plaintiffs' claims of unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1; (2) granting defendants' motions for partial summary judgment, thereby establishing plaintiffs' status as limited purpose public figures; and (3) granting defendants' motions for summary judgment on plaintiffs' defamation claims.

I.

[1] Before addressing the arguments, however, we first consider whether the plaintiffs' appeals are properly before us. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 59 (1998) (citing *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980)). Defendants filed a motion to strike plaintiffs' first assignment of error for plaintiffs' failure to designate all judgments and orders from which appeal was taken. Plaintiffs filed a response arguing that the first assignment of error was properly before our Court.

The substituted notice of appeal in the amended record on appeal stated:

> Plaintiffs George L. Gaunt and Center for Reproductive Medicine, P.A. hereby give notice of appeal to the North Carolina Court of Appeals from those Orders and Judgments by the Honorable Marvin K. Gray signed and filed in this action on June 24, 1997, granting all the defendants' motions for summary judgment, dismissing plaintiffs' actions with prejudice, and taxing costs against plaintiffs.

The substituted notice of appeal in the amended record on appeal clearly did not designate appeal from the orders entered by the trial court prior to 24 June 1997. The substituted notice of appeal in the amended record on appeal in this case designates appeal only from the "Orders and Judgments" the trial court entered on 24 June 1997. N.C.R. App. P. Rule 3(d) requires that the notice of appeal "designate the judgment or order from which appeal is taken[.]" Our Court has stated that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result

in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990). Even construing plaintiffs' notice of appeal liberally, it does not give rise to any inference, reasonable or otherwise, of an intent to appeal orders issued other than the 24 June 1997 orders and judgments.

The question before us then is whether the orders entered prior to 24 June 1997, which are not designated in the notice of appeal, are nevertheless reviewable. Defendants' motion to strike was directed only to plaintiffs' first assignment of error which addresses the trial court's order dismissing plaintiffs' claim of unfair and deceptive practices entered 10 May 1994. However, we must also determine whether the trial court's partial summary judgment entered 25 July 1995 on the issue of whether plaintiffs were public figures for purposes of the newspaper story is reviewable.

N.C. Gen. Stat. § 1-278 (1996) provides that: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." Defendants argue in their motion to strike that although plaintiffs may obtain review of the public figure partial summary judgment, plaintiffs may not assign error to the unfair and deceptive practices claim under N.C.G.S. § 1-278 because that claim did not involve the merits of the remaining claims of defamation and libel and did not affect the judgment. Plaintiffs disagree, arguing that case law establishes that the merits were involved, and courts interpret "necessarily affecting the judgment" broadly.

Our Supreme Court recently set out in *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51-52, 510 S.E.2d 156, 158-59 (1999) the conditions under which an interlocutory order may be reviewed under N.C.G.S. § 1-278: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Our Supreme Court twice noted in *Floyd* that the plaintiffs timely objected to an order that was later found to be reviewable on appeal under N.C.G.S. § 1-278 despite the order's absence from the notice of appeal. *Floyd*, 350 N.C. at 51-52, 510 S.E.2d at 159. The order in *Floyd* to which the plaintiffs objected was made during the actual trial of the case and only days before the final judgment. However, the orders

in the case before us were pre-trial orders dismissing one claim and granting partial summary judgment as to another issue. *Id.* at 49, 510 S.E.2d at 158. The Court stated in *Floyd* that "plaintiffs' timely objection to the order was overruled[,]" "plaintiffs duly objected to the election of remedies order at trial" and "it [was] quite clear from the record that plaintiffs sought appeal of the election order." *Id.* at 51-52, 510 S.E.2d at 159. Our Supreme Court concluded that "[t]he objection at trial to the election order properly preserved the question for appellate review." *Id.* at 52, 510 S.E.2d at 159. The record in the case before us, unlike *Floyd*, reflects nothing that could be construed as an objection by plaintiffs to the orders entered by the trial court prior to 24 June 1997.

Citing *Floyd*, our Court recently held in *Inman v. Inman*, 134 N.C. App. 719, — S.E.2d — (1999), that the plaintiff did not preserve his right to appeal from an order which was not issued at trial and which was omitted from the notice of appeal because, under N.C.G.S. § 1-278 and the *Floyd* opinion, the plaintiff did not object to the ruling of the trial court denying his relief in part. The plaintiff in *Inman* moved to dismiss a judgment of absolute divorce on 10 June 1997, and the defendant counterclaimed for equitable distribution. The trial court found that part of the separation agreement was void as against public policy and that the defendant's counterclaim was barred as to some property, and filed an order with these findings on 11 June 1997. After a bench trial on the equitable distribution issues on 18 March 1998, the plaintiff filed notice of appeal to our Court only from the 18 March 1998 judgment and not from the 11 June 1997 order. Regarding the 11 June 1997 order, our Court stated that "[t]he record reflects no objection to the order by either party, nor was notice of appeal entered by either party." *Inman*, 134 N.C. App. at —, — S.E.2d at —. Our Court then held that

> plaintiff made no such objection to the ruling of the trial court which partially denied his plea in bar, nor did he preserve his right to appeal in any other manner. Thus, assuming *arguendo* that the order of 11 June 1997 was an interlocutory order, that order is not reviewable on this appeal.

Id.

The issue in the case now before us is very similar to the issue in *Inman* and this Court is bound by *Inman*. *See In The Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("We hold . . . that a panel of the Court of Appeals is bound by a prior

decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.").

Plaintiffs' request for appellate review of the orders entered prior to 24 June 1997 under N.C.G.S. § 1-278 is immediately defeated for plaintiffs' failure to object to the orders, and discussion of the two other requirements for review of an intermediate order under *Floyd* is obviated. Therefore, pursuant to N.C.R. App. P. Rule 4(b), we do not address the 10 May 1994 order dismissing plaintiffs' action for "unfair and deceptive acts or practices" for failure to state a claim nor the orders entered 25 July 1995 granting defendants' motions for partial summary judgment on the public figure issue.

II.

[2] Plaintiffs argue that the trial court erred by granting summary judgment to defendants on plaintiffs' claims of defamation. Our Court's standard of review on appeal from summary judgment requires a two-part analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c); *see also Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial. *Id.* at 394, 499 S.E.2d at 775; *see also Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

There are two separate torts encompassed by the term "defamation," being libel and slander. Generally, "libel is written while slander is oral." *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). "[W]hen defamatory words are spoken with the intent that the words be reduced to writing, and the words are in fact written, the publication is both slander and libel." *Id.* at 278, 450 S.E.2d at 756, *quoting Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). However, since plaintiffs' complaint and arguments on appeal are based entirely upon libel, we address only the issue of libel.

> This Court has defined libel *per se* as a publication which, *when considered alone without explanatory circumstances*: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

Aycock v. Padgett, 134 N.C. App. 164, —, — S.E.2d —, — (1999).

In its 25 July 1995 order, the trial court determined that plaintiffs were limited-purpose public figures for purposes of the newspaper story. That ruling will not be reviewed on appeal for the reasons stated above. Individuals found to be limited-purpose public figures bear the burden of proving that alleged defamatory statements against them were published with actual malice in order to recover damages. *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964); *see also Gertz v. Welch*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974), *cert. denied*, 459 U.S. 1226, 75 L. Ed. 2d 467 (1983). The United States Supreme Court has defined "actual malice" as publication of a statement with knowledge that it was false or with reckless disregard as to whether it was false. *New York Times Co.* at 279-80, 11 L. Ed. 2d at 706. Proving reckless disregard requires the plaintiff to offer "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 20 L. Ed. 2d 262, 267 (1968).

Because plaintiffs are limited-purpose public figures, they bear the burden of not only showing that defendants knew of the falsity of their statements, but also of proving that defendants acted with actual malice. Whether a plaintiff has proven actual malice on the part of a defendant is a matter that is properly determined by the trial court. *See Proffitt v. Greensboro News & Record*, 91 N.C. App. 218, 371 S.E.2d 292 (1988). When a public figure's libel action is considered at the summary judgment stage, "the appropriate question for the trial judge is whether the evidence in the record would allow a reasonable finder of fact to find either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Id.* at 221, 371 S.E.2d at 293-94 (citation omitted).

The United States Supreme Court has held that statements of opinion relating to matters of public concern which do not contain provable false connotations are constitutionally protected. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L. Ed. 2d 1 (1990). Our review of the record in this matter reveals that the statements made by

defendants are statements of opinion affecting matters of public concern within the context of *Milkovich*. *See id.* at 19, 111 L. Ed. 2d at 18. Assuming *arguendo* that defendants' statements were not matters of opinion, plaintiffs failed to show malice on the part of defendants. For the foregoing reasons, the trial court did not err in granting summary judgment to the defendants on plaintiffs' defamation claims.

Affirmed.

Judges GREENE and MARTIN concur.

GEORGE L. GAUNT, BARBARA G. FIELDS, CENTER FOR REPRODUCTIVE MEDICINE, P.A., DONALD S. HORNER, AND DONALD S. HORNER, P.A., PLAINTIFFS-APPELLANTS v. DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, AND THE NALLE CLINIC, DEFENDANTS-APPELLEES

No. COA98-823

(Filed 29 August 2000)

1. Appeal and Error— orders omitted from notice of appeal—considered under N.C.G.S. § 1-278

Trial court orders dismissing an action for unfair or deceptive trade practices and granting a partial summary judgment on a defamation claim were reviewed despite their absence from the notice of appeal where the requirements for applying N.C.G.S. § 1-278 were satisfied. The first requirement was met under N.C.G.S. § 1A-1, Rule 46 when plaintiffs indicated their objection to the action of the court in their motions opposing defendants' motions to dismiss even though they did not timely object at the motions hearing. The second requirement was met in that the trial court orders did not dispose of the entire case and are interlocutory, with no exception applicable to allow an interlocutory appeal. Finally, the third requirement was met in that the order dismissing the unfair practices claim deprived plaintiffs of one of their claims and affected the judgment.

2. Unfair Trade Practices— statements by infertility specialists—medical professionals excluded from statute

The trial court did not err by granting summary judgment for defendants on an unfair or deceptive practices claim arising from a newspaper story about in vitro fertilization. Plaintiffs have no claim against defendants under N.C.G.S. § 75-1.1 because medical professionals are expressly excluded from the scope of the statute and it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this statute.

3. Libel and Slander— limited purpose public figure—summary judgment

The trial court did not err in a defamation action by granting defendants' motion for partial summary judgment on the issue of whether plaintiff Gaunt was a public figure. Under North Carolina

law, an individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy.

Appeal by plaintiffs from orders and judgments entered 24 June 1997 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Originally heard in the Court of Appeals 30 March 1999.

Wood & Francis, PLLC, by John S. Austin; Wyrick, Robbins, Yates & Ponton, LLP, by Gary V. Mauney; for plaintiffs-appellants.

Jones, Hewson & Wollard, by Lawrence J. Goldman, for defendants-appellees Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and The Nalle Clinic.

Koy E. Dawkins, P.A., by Koy E. Dawkins, for defendant-appellee Carolyn B. Coulam.

Dean & Gibson, L.L.P., by Michael G. Gibson and John W. Ong, for defendant-appellee Donald E. Pittaway.

F. Kevin Mauney for defendants-appellees Morgan D. Gainor and Charles J. Gainor.

McGEE, Judge.

This case arose from a newspaper story entitled " 'Miracle Baby' Attempts Raise Questions" (the story), which was published in *The Charlotte Observer* on 15 September 1991. The story was about infertility treatment, with special emphasis on *in vitro* fertilization and the type of medical training expected of physicians performing that procedure. The story focused on plaintiffs George L. Gaunt (Gaunt) and the Center for Reproductive Medicine, P.A. (the Center). Defendants Jack L. Crain, Richard L. Wing and Daniel B. Whitesides, all of whom were shareholders and employees of defendant The Nalle Clinic, are infertility specialists and were interviewed for the newspaper story as to their opinions of Gaunt's expertise as an infertility specialist and his work at the Center. Plaintiffs allege that several of the statements made by defendants Crain, Wing, and Whitesides in the story, and the interviews leading up to its publication, were defamatory and constituted unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1.

Defendant Donald E. Pittaway, Director of Reproductive Endocrinology at Bowman Gray School of Medicine, was similarly

interviewed for the story and made several statements regarding his opinion of Gaunt's training and expertise in the field of *in vitro* fertilization. Pittaway also made statements to the effect that, in his opinion, Gaunt made a practice of ordering tests that were unnecessary or excessive. Plaintiffs filed this action alleging these statements were defamatory and constituted an unfair and deceptive practice.

Defendants moved to dismiss plaintiffs' claims for unfair and deceptive practices pursuant to N.C.R. Civ. P. 12(c), and the trial court granted the motion on 10 May 1994. Defendants then moved for partial summary judgment pursuant to N.C.R. Civ. P. 56(c) on the issue of whether plaintiffs were public figures for purposes of the newspaper story. Plaintiffs moved to strike certain exhibits defendants offered supporting their motion for partial summary judgment. Plaintiffs' motion to strike was denied and the trial court granted defendants' motion for partial summary judgment determining plaintiffs were public figures for purposes of the story in orders entered 25 July 1995. Defendants then moved for summary judgment on plaintiffs' defamation claims. These motions were subsequently granted in orders and judgments entered on 24 June 1997.

Plaintiffs timely filed a notice of appeal of the 24 June 1997 orders and judgments on plaintiffs' defamation claims. An opinion of this Court, affirming the judgment of the trial court, was filed on 2 November 1999. Plaintiffs' petition for rehearing was filed 7 December 1999. The petition was granted, in part, on 21 December 1999 for review of the applicability of Rule 46(b) of the N.C. Rules of Civil Procedure to the appeal. The petition was heard after the filing of additional briefs without oral argument. This opinion supersedes the previous opinion of our Court relating only to the issue for which the order for rehearing was granted. Our question is whether the orders entered prior to the 24 June 1997 order are reviewable. These prior orders are (1) the 10 May 1994 order of the trial court dismissing plaintiffs' action for unfair and deceptive acts or practices for failure to state a claim, and (2) the orders of the trial court entered 25 July 1995 granting defendants' motions for partial summary judgment on the public figure issue.

I.

[1] We first consider whether plaintiffs' assignments of error were preserved for appeal and are therefore reviewable by our Court. N.C.R. App. P. Rule 3(d) requires that the notice of appeal "designate

the judgment or order from which appeal is taken [.]" The substituted notice of appeal in the amended record on appeal stated:

> Plaintiffs George L. Gaunt and Center for Reproductive Medicine, P.A. hereby give notice of appeal to the North Carolina Court of Appeals from those Orders and Judgments by the Honorable Marvin K. Gray signed and filed in this action on June 24, 1997, granting all the defendants' motions for summary judgment, dismissing plaintiffs' actions with prejudice, and taxing costs against plaintiffs.

This notice of appeal does not designate appeal from the orders entered by the trial court prior to 24 June 1997, but only from the "Orders and Judgments" entered on 24 June 1997. Our Court has stated that a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156-57, 392 S.E.2d 422, 424 (1990). However, the notice of appeal in this case does not give rise to any inference of an intent to appeal orders issued other than the 24 June 1997 orders and judgments.

The question before us then is whether the orders entered prior to 24 June 1997, both the 10 May 1994 unfair and deceptive practices claim and the 25 July 1995 public figure partial summary judgment, which are not designated in the notice of appeal, are nevertheless reviewable. N.C. Gen. Stat. § 1-278 (1996) provides that: "Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." In *Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51-52, 510 S.E.2d 156, 158-59, *disc. review denied*, 350 N.C. 830, — S.E.2d — (1999), our Supreme Court set out the conditions under which an interlocutory order may be reviewed under N.C.G.S. § 1-278: (1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment.

Regarding the first requirement under *Floyd*, although plaintiffs did not timely object at the motion hearing to the trial court's granting defendants' motions to dismiss plaintiffs' claim for unfair and deceptive acts or practices, Rule 46 of the North Carolina Rules of Civil Procedure provides that "[w]ith respect to rulings and orders of

the court not directed to the admissiblity of evidence, formal objections and exceptions are unnecessary." N.C. Gen. Stat. § 1A-1, Rule 46(b) (1999). Rather, a party may preserve an objection by "mak[ing] known to the court his objection to the action of the court" or "mak[ing] known the action which he desires the court to take and his ground therefor[.]" *Id.* Plaintiffs indicated such objection in their motions opposing defendants' motions to dismiss, and our Court recently held this satisfies the first procedural requirement in *Floyd*. Our Court stated in *Inman v. Inman*, 136 N.C. App. 707, 711-12, 525 S.E.2d 820, 823, *cert. denied*, 351 N.C. 641, —— S.E.2d —— (2000), that

> Under G.S. 1A-1, Rule 46(b), with respect to rulings and orders of the trial court not directed to admissibility of evidence, no formal objections or exceptions are necessary, it being sufficient to preserve an exception that the party, at the time the ruling or order is made or sought, makes known to the court his objection to the action of the court or makes known the action which he desires the court to take and his ground therefor.

Id.

The second requirement of *Floyd* is that the orders being reviewed must be interlocutory and not immediately appealable. "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazy v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). Because the trial court's orders of 10 May 1994 and 25 July 1995 did not dispose of the entire case, they are interlocutory. Generally, there is no right of immediate appeal from an interlocutory order. N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990); *see also Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Although there are exceptions to this rule, none apply in the case before us, and therefore the interlocutory orders are not immediately appealable. *See* N.C. Gen. Stat. §§ 1-277(a) (1996), 7A-27(d) (1995).

As to the third requirement, plaintiffs argue the order dismissing their unfair and deceptive practices claim involved the merits and necessarily affected the judgment by "depriv[ing] plaintiffs of one of their claims," borrowing the language in *Floyd*. *See Floyd*, 350 N.C. at 51, 510 S.E.2d at 159. However, defendants insist that plaintiffs' unfair and deceptive practices claim "did not, in any way, involve the merits of the remaining defamation claims." Defendants emphasize that the

word "merits" rather than "facts" appears in N.C.G.S. § 1-278 and argue that "merits" refers to the "strict legal rights of the parties" which for unfair or deceptive practices are distinct from the legal rights involved in plaintiffs' remaining claims. Regardless, our Supreme Court in *Floyd* used a different analysis of whether an order involves the merits and necessarily affects the judgment when it stated, "[b]ecause the election of remedies order deprived plaintiffs of one of their claims, it involved the merits and affected the judgment." *Floyd*, 350 N.C. at 51, 510 S.E.2d at 159. The Court did not discuss whether the prior order must involve the same strict legal rights of the parties as those adjudged in the judgment, as defendants argue, but did state that an order depriving plaintiffs of one of their claims will qualify as involving the merits and affecting the judgment.

Therefore in this case, we agree with plaintiffs that because the order dismissing their claims for unfair and deceptive practices deprived them of one of their claims, the order involved the merits and affected the judgment. We also believe the order granting defendants' motions for partial summary judgment on the public figure issue involved the merits and necessarily affected the judgment, as defendants conceded in their motion arguing against our review of the prior orders. *Cf. Wells v. Wells*, 132 N.C. App. 401, 512 S.E.2d 468, *cert. denied*, 350 N.C. 599, —— S.E.2d —— (1999) (grant of a counterclaim for specific performance of separation agreement reviewable on appeal even though wife's notice of appeal did not reference it, as it involved the merits and necessarily affected the final judgment); *In re Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 364 S.E.2d 723, *cert. denied*, 322 N.C. 480, 370 S.E.2d 222 (1988) (order withdrawing an upset bid and directing a resale of foreclosed property reviewable even where appellants did not timely appeal from it because order involved the merits and necessarily affected the judgment). As *Floyd*'s requirements for applying N.C. Gen. Stat. § 1-278 are satisfied, we will review the orders entered prior to 24 June 1997 which are absent from the notice of appeal.

II.

[2] Plaintiffs contend the trial court erred in dismissing their claims of unfair and deceptive practices under N.C. Gen. Stat. § 75-1.1 (1994). Subsection (a) of the statute provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C.G.S. § 75-1.1(a). Subsection (b) defines "commerce" to include "all business activities, however denominated, but does not include

professional services rendered by a member of a learned profession." N.C.G.S. § 75-1.1(b). Our Court has made clear that unfair and deceptive acts committed by medical professionals are not included within the prohibition of N.C.G.S. § 75-1.1(a). *Cameron v. New Hanover Mem. Hosp.*, 58 N.C. App. 414, 446, 293 S.E.2d 901, 920, *cert. denied*, 307 N.C. 127, 297 S.E.2d 399 (1982); *see also Cohn v. Wilkes Gen. Hosp.*, 767 F. Supp. 111, 114 (W.D.N.C.), *aff'd*, 953 F.2d 154 (4th Cir. 1991), *cert. denied*, 505 U.S. 1230, 120 L. Ed. 2d 922 (1992) ("[M]edical professionals are not contemplated by North Carolina's prohibition of unfair trade practices.").

Nonetheless, plaintiffs argue that defendants' statements are crimes and as such "cannot be a legal medical service" under the statute authorizing revocation of medical licenses. According to plaintiffs, "therefore, it follows that such actions cannot be 'exempt' from the coverage of Chapter 75." In support of their argument, plaintiffs cite a law review article entitled "The Learned Professional Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line." Plaintiffs' argument fails for the simple reason that medical professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a) and thus it clearly does not follow that a statement by a medical professional, criminal or otherwise, is governed by this particular statute. Plaintiffs have no claim against defendants under N.C.G.S. § 75-1.1 for unfair or deceptive acts or practices. The trial court did not err in granting summary judgment in favor of the defendants on this issue.

III.

[3] Plaintiffs argue that the trial court erred by granting defendants' motions for partial summary judgment entered 25 July 1995, thereby establishing plaintiffs' status as limited purpose public figures and granting defendants' motions for summary judgment on plaintiffs' defamation claims. Our Court's standard of review on appeal from summary judgment requires a two-part analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c); *see also Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish

a *prima facie* case at trial. *Id.* at 394, 499 S.E.2d at 775; *see also Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L. Ed. 2d 686 (1964), the United States Supreme Court held the First and Fourteenth Amendments prohibit "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice[.]' " *Id.* at 279-80, 11 L. Ed. 2d at 706. Three years later, the Court extended the application of the *New York Times* "actual malice" standard to speech about "public figures," but provided little guidance as to which plaintiffs fell into that category. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967). In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789 (1974), the Supreme Court elaborated on the types of defamation plaintiffs, whereby private individuals were distinguished from both public officials and public figures, the latter of whom were then divided into three categories. The *Gertz* Court described involuntary public figures, all purpose public figures, and limited purpose public figures. *Id.* at 345, 41 L. Ed. 2d at 808. Following *Gertz*, a defamation plaintiff who is a public official or public figure "may recover injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth," which is the *New York Times* "actual malice" standard. *Id.* at 342, 41 L. Ed. 2d at 807.

In the orders entered 25 July 1995, the trial court granted defendants' motions for partial summary judgment on the issue of whether plaintiffs were limited purpose public figures. The Court in *Gertz* stated that a limited purpose public figure is one who "voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Id.* at 351, 41 L. Ed. 2d at 812. In the course of deciding three other cases, the Supreme Court developed a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure: (1) was there a particular "public controversy" that gave rise to the alleged defamation and (2) was the nature and extent of the plaintiff's participation in that particular controversy sufficient to justify "public figure" status? *See Time, Inc. v. Firestone*, 424 U.S. 448, 47 L. Ed. 2d 154 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111, 61 L. Ed. 2d 411 (1979); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 61 L. Ed. 2d 450 (1979). By contrast, the United States Court of Appeals for the Fourth Circuit has set forth five requirements,

which need not be identified herein, that a defamation plaintiff must prove before a court can properly treat the plaintiff as a public figure for the limited purpose of comment on a particular public controversy. *See Fitzgerald v. Penthouse Int'l, Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024, 75 L. Ed. 2d 497 (1983); *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.) (en banc), *cert. denied*, 501 U.S. 1212, 115 L. Ed. 2d 986 (1991). Under North Carolina law, an individual may become a limited purpose public figure "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy[.]" *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435-36, 291 S.E.2d 852, 857 (1982), *disc. review denied*, 307 N.C. 459, 298 S.E.2d 385 (1983) (adopting language of the United States Supreme Court in *Curtis Publishing Co.*).

We believe plaintiffs satisfied both the federal and state definitions of limited purpose public figures. First, there was an important public controversy surrounding *in vitro* fertilization at the time of *The Charlotte Observer* news article. One controversial question, for example, was whether a doctor performing *in vitro* fertilization should have special training in reproductive endocrinology. Several major news sources published articles on the debate, including *Time*, *Newsweek*, *Life*, *Forbes*, *People*, *Business Week*, *U.S. News & World Report*, *The Wall Street Journal* and the *Los Angeles Times*. Moreover, during this time the United States Congress and the North Carolina General Assembly debated the consumer protection issues involving *in vitro* fertilization clinics. *See Wolston*, 443 U.S. at 167, 61 L. Ed. 2d at 459 (suggesting in dicta there can be no "public controversy" unless the issues involved were truly divisive, or subject to debate—a requirement criticized by lower courts and commentators). Even Gaunt's agent, Bill Ballenger, repeatedly acknowledged there was a national controversy about infertility treatment. When questioned about the popularity of the subject, he stated "Yes, there certainly was a hot public debate, no doubt."

Furthermore, it is clear that Gaunt thrust himself into the vortex of the controversy. Gaunt, referring to the infertility treatment controversy, admitted that he had "spent every spare moment trying to stop this lunacy[.]" He also wrote to several politicians, hired a personal lobbyist, and procured the services of a public relations agent to enhance his public image. Gaunt also provided *The Charlotte Observer* with his side of the debate, for example in quotations such as: "As long as you have the background, understand how to interpret

the tests, have a medical license and are able to deal with the patient, then you have the potential of being an infertility specialist." We agree with the trial court that Gaunt is a limited purpose public figure for purposes of this action. The trial court did not err in granting defendants' motion for partial summary judgment on the public figure issue, in that there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law.

We hold that the trial court did not err in dismissing plaintiffs' claims of unfair and deceptive practices under N.C.G.S. § 75-1.1. The trial court also did not err in granting partial summary judgment finding Gaunt to be a public figure for purposes of defamation in this case. Plaintiffs' arguments concerning the trial court's granting summary judgment to defendants on plaintiffs' defamation claims were determined in the prior opinion of this Court.

Affirmed.

Judges GREENE and MARTIN concur.

APPENDIX C

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG
92-CVS-9644

GEORGE L. GAUNT, BARBARA G. FIELDS, and CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Plaintiffs,

vs.

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC,

Defendants.

ORDER

This matter was heard by the undersigned Judge Presiding at the July 14, 1995 Special Session of the Superior Court of Mecklenburg County, North Carolina with respect to (1) Plaintiffs' July 10, 1995 Motion To Strike Exhibits of Defendant Knight Publishing Company; and (2) the Motions for Partial Summary Judgment on the Public Figure Issue filed by defendants Donald E. Pittaway, Nancy I. Teaff, Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, Carolyn B. Coulam, Morgan D. Gainor, Charles J. Gainor and The Nalle Clinic ("the defendants"). The parties have previously consented in the April 6, 1995 Case Management Order to the signing and entering of all Orders in this case out of session, out of term, out of county and out of district.

The Court heard oral argument from counsel for plaintiffs and counsel for defendants, and considered the pleadings filed in the case, the affidavits filed on behalf of the plaintiffs and defendants, the discovery responses and deposition transcripts filed with the Court, and additional evidentiary materials submitted by defendants in Gaunt, et al. v. The Knight Publishing Company, Inc., et al., 92-CVS-9645, and adopted by defendants in this action by reference thereto.

With regard to plaintiffs' Motion To Strike, the Court determined that, except with regard to defendants' Exhibit 70, the evidence objected to by plaintiffs was appropriate for consideration by the Court for the purposes defendants submitted such evidence. For example, the contents of the newspaper and magazine articles objected to by plaintiffs on hearsay grounds were considered by the Court for the purpose of demonstrating that the articles were published as written but not for the purpose of proving the truth of any of the contents. The Court determined that with respect to Exhibit 70 the record presently lacks sufficient evidence to demonstrate that it is a newspaper or magazine article which falls within the definition of Rule 902(6) of the North Carolina Rules of Evidence as a self-authenticating document, and the Court therefore disregarded it in ruling on the motion for partial summary judgment.

The Court also determined: (1) that there exists no genuine issue of material fact regarding the status of plaintiffs George L. Gaunt and Center for Reproductive Medicine, P.A. as limited purpose public figures for purposes of the libel claims brought by plaintiffs, (2) that plaintiffs are, for the purposes of the newspaper article at issue in this action, limited purpose public figures as a matter of law in accordance with New York Times v. Sullivan, 376 U.S. 254 (1964) and the legal authority

emanating therefrom, and (3) that the defendants are entitled to partial summary judgment to this effect.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

1. Plaintiff's Motion to Strike Exhibit of Defendant Knight Publishing Company is GRANTED only with regard to defendants' Exhibit 70, and except as herein granted, plaintiffs' Motion to Strike Exhibit of Defendant Knight Publishing Company is, as set forth above, in all other respects DENIED.

2. Defendants' Motions for Partial Summary Judgment on the Public Figure Issue are GRANTED with regard to plaintiff George L. Gaunt and plaintiff Center for Reproductive Medicine, P.A., and these plaintiffs, are as a matter of law, limited purpose public figures for the purposes of this libel action.

This the 21st day of July, 1995.

/s/ Marvin K. Gray
Superior Court Judge

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG
92-CVS-9644

GEORGE L. GAUNT, BARBARA G. FIELDS, and CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Plaintiffs,

vs.

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC,

Defendants.

ORDER AND JUDGMENT ALLOWING MOTION FOR SUMMARY JUDGMENT OF JACK L. CRAIN, DANIEL. B. WHITESIDES, RICHARD L. WING AND THE NALLE CLINIC

THIS CAUSE was heard on June 23, 1997, in the Superior Court of Mecklenburg County on the defendants Jack L. Crain, Daniel B. Whitesides, Richard L. Wing and the Nalle Clinic's motion for summary judgment under Rule 56 as to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. The Court has reviewed the entire record presented to it, and has heard argument by counsel for the parties. The Court finds that

there is no genuine issue as to any material fact with respect to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. against the defendants Jack L. Crain, Daniel B. Whitesides, Richard L. Wing and The Nalle Clinic, and that the defendants, Jack L. Crain, Daniel B. Whitesides, Richard L. Wing and The Nalle Clinic's motion for summary judgment should be allowed.

It is, therefore, ORDERED, ADJUDGED and DECREED as follows:

1. That the defendants, Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and The Nalle Clinic's motion for summary judgment is allowed;

2. That the plaintiffs, George L. Gaunt's and the Center for Reproductive Medicine, P.A.'s actions against the defendants Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and the Nalle Clinic are dismissed with prejudice; and

3. That the costs of the defendants Jack L. Crain, Daniel B. Whitesides, Richard L. Wing, and the Nalle Clinic are taxed against the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. pursuant to G.S. § 6-19.

This 24th day of June, 1997.

/s/ Honorable Marvin K. Gray
Superior Court Judge

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG
92-CVS-9644

GEORGE L. GAUNT, BARBARA G. FIELDS, and CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Plaintiffs,

vs.

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC,

Defendants.

ORDER AND JUDGMENT ALLOWING MOTION FOR SUMMARY JUDGMENT OF DONALD E. PITTAWAY

THIS CAUSE was heard on June 23, 1997, in the Superior Court of Mecklenburg County on the defendant Donald E. Pittaway's motion for summary judgment under Rule 56 as to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. The Court has reviewed the entire record presented to it, and has heard argument by counsel for the parties. The Court finds that there is no genuine issue as to any material fact with respect to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. against the defendant Donald E. Pittaway, and that the defendant

Donald E. Pittaway's motion for summary judgment should be allowed.

It is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant Donald E. Pittaway's motion for summary judgment is allowed;

2. That the plaintiffs George L. Gaunt's and the Center for Reproductive Medicine, P.A.'s actions against the defendant Donald E. Pittaway are dismissed with prejudice; and

3. That the costs of the defendant Donald E. Pittaway are taxed against the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. pursuant to G.S. § 6-19.

This 24th day of June, 1997.

/s/ Honorable Marvin K. Gray
Superior Court Judge

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG
92-CVS-9644

GEORGE L. GAUNT, BARBARA G. FIELDS, and CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Plaintiffs,

vs.

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC,

Defendants.

ORDER AND JUDGMENT ALLOWING MOTION FOR SUMMARY JUDGMENT OF CAROLYN B. COULAM

THIS CAUSE was heard on June 23, 1997, in the Superior Court of Mecklenburg County on the defendant Carolyn B. Coulam's motion for summary judgment under Rule 56 as to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. The Court has reviewed the entire record presented to it, and has heard argument by counsel for the parties. The Court finds that there is no genuine issue as to any material fact with respect to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. against the defendant Carolyn B. Coulam, and that the defendant

Carolyn B. Coulam's motion for summary judgment should be allowed.

It is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant, Carolyn B. Coulam's motion for summary judgment is allowed;

2. That the plaintiffs George L. Gaunt's and the Center for Reproductive Medicine, P.A.'s actions against the defendant Carolyn B. Coulam are dismissed with prejudice; and

3. That the costs of the defendant Carolyn B. Coulam are taxed against the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. pursuant to G.S. § 6-19.

This 24th day of June, 1997.

/s/ Honorable Marvin K. Gray
Superior Court Judge

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF MECKLENBURG
92-CVS-9644

GEORGE L. GAUNT, BARBARA G. FIELDS, and CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Plaintiffs

vs.

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC,

Defendants.

ORDER AND JUDGMENT ALLOWING MOTION FOR SUMMARY JUDGMENT OF MORGAN D. GAINOR AND CHARLES J. GAINOR

THIS CAUSE was heard on June 23, 1997, in the Superior Court of Mecklenburg County on the defendants Morgan D. Gainor and Charles J. Gainor's motion for summary judgment under Rule 56 as to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. The Court has reviewed the entire record presented to it, and has heard argument by counsel for the parties. The Court finds that there is no genuine issue as to any material fact with respect to the claims of the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. against the defendants Morgan D. Gainor and Charles

J. Gainor, and that the defendants Morgan D. Gainor and Charles J. Gainor's motion for summary judgment should be allowed.

It is, therefore, ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendants Morgan D. Gainor and Charles J. Gainor's motion for summary judgment is allowed;

2. That the plaintiffs George L. Gaunt's and the Center for Reproductive Medicine, P.A.'s actions against the defendants Morgan D. Gainor and Charles J. Gainor are dismissed with prejudice; and

3. That the costs of the defendants Morgan D. Gainor and Charles J. Gainor are taxed against the plaintiffs George L. Gaunt and the Center for Reproductive Medicine, P.A. pursuant to G.S. § 6-19.

This 24th day of June, 1997.

/s/ Honorable Marvin K. Gray
Superior Court Judge

APPENDIX D

NO. 472P00 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Gaunt et al v. Pittaway et al)

GEORGE L. GAUNT, BARBARA G. FIELDS, CENTER FOR REPRODUCTIVE MEDICINE, P.A., DONALD S. HORNER, AND DONALD S. HORNER, P.A.

v

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC

From NC Court of Appeals
(COA98-823)
From Mecklenburg
(92CVS9644)

****

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by Defendants (Pittaway, Crain, Whitesides, Wing, Coulam and The Nalle Clinic), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 21st day of December, 2000.

s/Parker, J.
For the Court"

Upon consideration of the petition filed by Plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 21st day of December 2000.

s/Parker, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 28th day of December 2000.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

/s/Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Gary V. Mauney, Attorney at Law, For
Gaunt and Center for Reproductive
Mr. John S. Austin, Attorney at Law, For
Gaunt and Center for Reproductive
Mr. Michael G. Gibson, Attorney at Law, For
Pittaway
Mr. John Ong, Attorney at Law, For
Donald E. Pittaway
Mr. Lawrence J. Goldman, Attorney at Law, For

Crain, Whitesides, Wing, Nalle Clinic
Mr. Koy E. Dawkins, Attorney at Law, For Coulam
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis

NO. 472P00-2 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

(Gaunt et al v. Pittaway et al)

GEORGE L. GAUNT, BARBARA G. FIELDS, CENTER FOR REPRODUCTIVE MEDICINE, P.A., DONALD S. HORNER, AND DONALD S. HORNER, P.A.

v

DONALD E. PITTAWAY, NANCY O. TEAFF, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR, SHELLEY J. MOORE, KEVIN C. MOORE, and THE NALLE CLINIC

From NC Court of Appeals
(COA98-823)
From Mecklenburg
(92CVS9644)

****

ORDER

Upon consideration of the petition filed by Plaintiffs (Gaunt and Center for Reproductive Medicine, P.A.) In this matter for a writ of certiorari to review the decisions of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 5th day of April 2001.

s/Butterfield, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 11th day of April 2001.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina

/s/ Carol B. Templeton
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Gary V. Mauney, Attorney at Law, For
Gaunt and Center for Reproductive
Mr. John S. Austin, Attorney at Law, For
Gaunt and Center for Reproductive
Mr. Michael G. Gibson, Attorney at Law, For
Pittaway
Mr. John Ong, Attorney at Law, For
Donald E. Pittaway
Mr. Lawrence J. Goldman, Attorney at Law, For
Crain, Whitesides, Wing, Nalle Clinic
Mr. Koy E. Dawkins, Attorney at Law, For
Coulam
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis

APPENDIX E

NOTEBOOK OF MATERIALS SUBMITTED IN SUPPORT OF DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON PUBLIC FIGURE ISSUE

EXHIBIT
NO.

1. Article in September 15, 1991 issue of The Charlotte Observer entitled, "'Miracle Baby' Raises Questions"

2. March 6, 1985 letter from George Gaunt to H.A. Thompson (thanking radio station for appearance on radio show program)

3. April 1985 issue of Centerpiece (Center newsletter)

4. Article in May, 1985 issue of The Charlotte Observer entitled, "Mother's Day Can be Tough for Those Without Children"

5. Photograph and caption of Dr. George Gaunt and Barbara Fields in Winter, 1986 edition of the University of North Carolina at Charlotte News (presenting $300.00 nursing scholarship)

6. Letter to the Editor in January 5, 1987 issue of The Charlotte Observer entitled, "'Right' to Smoke Harms Others" by Dr. Gaunt

7. Article in May 10, 1987 issue of The Charlotte Observer entitled, "A Mother at Last" (Center mentioned, but not Dr. Gaunt)

8. Letter to Editor from Dr. George Gaunt in June 9, 1987 issue of The Charlotte Observer entitled, "Reproductive Morality - Perhaps God Works Through

Modern Medicine"

9. Article in July 9, 1987 issue of The Charlotte Observer entitled, "Center Performs Its First Test Tube Pregnancy"

10. October 7, 1987 letter from Dr. Gaunt to Karen Garloch (announcing ultrasound of first successful IVF patient at Center)

11. May, 1988 media information kit about Center for Reproductive Medicine and Dr. George Gaunt ("Ten Years of In Vitro Fertilization Bring Changes In Understanding and General Public's Attitude")

12. Article in May 20, 1988 issue of The Charlotte Observer entitled, "Test-Tube Twins Born in Stanly"

13. Article in October 1988 issue of North Carolina Magazine entitled, "Charlotte Clinic Offers Hopes to Couples Who are Childless"

13-A. December 14, 1988 letter from Bill Ballenger to Gary Nielson (addressing Center's "success in the new ultrasound in vitro process")

14. March 1989 media information kit on Center for Reproductive Medicine and Dr. George Gaunt (regarding birth of child to woman previously sterilized)

15. Article in March 26, 1989 issue of The Charlotte Observer entitled, "Waxhaw Couple Say Baby is Just Bully"

16. March 16, 1989 letter from Bill Ballenger to Karen Garloch (enclosing information on Center)

17. Undated article or advertisement in Health Care News entitled, "In Vitro Fertilization Helps Childless Couples Conceive"

18. Article in April 10, 1989 issue of The Business Journal entitled, "For 200 Couples This Clinic has Delivered"

19. May 4, 1989 letter from William Ballenger to Karen Garloch

20. Article in July, 1989 issue of Business North Carolina entitled, "The Baby Makers"

21. June 26, 1989 letter from Dr. George Gaunt to William Ballenger

22. January 24, 1990 letter from Bill Ballenger to Karen Garloch and news release entitled, "Center Grew from Need, Expertise to Address Multi-Faceted Problem"

23. Article in the May 20, 1990 issue of Greensboro News & Record entitled, "Turning to Science for Help"

24. Article in July/August 1990 issue of Charlotte Magazine entitled, "Facts and Misconceptions - The Physical and Psychological Issue of Infertility: UNCC Professor Julie Hill Shares Her Story"

25. Advertisement for Center for Reproductive Medicine in June 1988 issue of The Charlotte Observer

26. Advertisement for Center for Reproductive Medicine in December 1990 issue of The Charlotte Observer

27. Advertisement for Center for Reproductive Medicine

in August 1991 or September 1991 issue of The Charlotte Observer

28. Advertisement for Center for Reproductive Medicine in October 11, 1989 issue of Fort Mill Times

29. Advertisement for Center for Reproductive Medicine in October 13, 1989 issue of Magazine of the Times

30. Advertisement for Center for Reproductive Medicine in November 27, 1989 issue of The Business Journal

31. Advertisement for Center for Reproductive Medicine in 1989 edition of The Real Yellow Pages

32. Advertisement for Center for Reproductive Medicine in 1990 edition of The Real Yellow Pages

33. Advertisement for Center for Reproductive Medicine in 1991 edition of The Real Yellow Pages

34. May 31, 1988 invoice of Public Relations/Marketing Associates to Center for Reproductive Medicine

35. July 31, 1988 invoice of Public Relations/Marketing Associates to Center for Reproductive Medicine

36. August 31, 1988 invoice of Public Relations/Marketing Associates to Center for Reproductive Medicine

37. September 30, 1988 invoice of Public Relations/Marketing Associates to Center for Reproductive Medicine

38. October 31, 1988 invoice of Public Relations/Marketing Associates to Center for Reproductive Medicine

39. November 30, 1988 invoice from Carolina Public

Relations/Marketing, Inc. to Center for Reproductive Medicine

40. December 31, 1988 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

41. January 31, 1989 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

42. March 31, 1989 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

43. April 30, 1989 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

44. May 31, 1989 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

45. August 31, 1989 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

46. August 31, 1989 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

47. January 31, 1990 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

48. February 28, 1990 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

49. March 31, 1990 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

50. April 30, 1990 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

51. June 28, 1991 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

52. June 28, 1991 invoice from Carolina Public Relations/Marketing, Inc. to Center for Reproductive Medicine

53. Affidavit of Dr. Robert D. Visscher

54. Article in November 1987 issue of Fertility and Sterility entitled, "Are We Exploiting the Infertile Couple?"

55. Article in November 1989 issue of Fertility and Sterility entitled, "Truth in Advertising"

56. Report entitled, "Consumer Protection Issues Involving In Vitro Fertilization Clinics" by the House subcommittee on Regulation and Business Opportunities

57. Transcript of Representative Ron Wyden's remarks to the House of Representatives in November 26, 1991 edition of Congressional Record

58. Affidavit of Harrison Dekker

59. Affidavit of Stephen L. Meehan

60. Article in October 14, 1983 issue of Science entitled, "External Human Fertilization: An Evaluation of Policy"

61. Article in November 10, 1986 issue of People entitled, "An Infertile Couple's Search for a Remedy Gives Birth to Heartbreak and Anger, but also Hope"

62. Article in February 9, 1987 issue of Forbes entitled, "Easier Than Selling Soap"

63. Article in March 23, 1987 issue of Time entitled, "Technology and the Womb"

64. Article in June 1987 issue of Life entitled, "Baby Craving: Facing Widespread Infertility, A Generation Presses the Limits of Medicine and Morality"

65. Article in November 30, 1987 issue of Newsweek entitled, "The Grueling Baby Chase: Test-Tube Fertilization: Much Hope, Much Hype"

66. Article in May 18, 1988 issue of The Wall Street Journal entitled, "Study Cites Lack of Success with In Vitro Fertilization"

67. Article in March 1988 issue of Glamour entitled, "Infertility Hype"

68. Article in March 13, 1988 issue of Time entitled, "Trying to Fool the Infertile - Is In-Vitro Fertilization Being Oversold?"

69. Article in April 3, 1989 issue of U.S. News and World Report entitled, "What do Infertility Clinics Really Deliver?"

70. 1989 article distributed by Knight Ridder/Tribune

Service entitled, "Should Government Regulate Test-Tube Baby Industry"

71. Article in September 3, 1990 issue of Business Week entitled, "In Vitro Fertilization: Delivering That Ray of Hope"

72. Article in November 5, 1990 issue of Time entitled, "A Revolution in Making Babies - New Techniques Help Childless Couples - Even After Menopause"

73. Article in October 6, 1991 issue of Los Angeles Times entitled, "Health Horizons Medicine Searching for Fertility Twenty Years Ago, Couple Had Trouble Conceiving, They Were Left with Few Options. Today, Medical Advances Provide Couples with More than a Handful of Choices. With These Alternatives, However, An Intimate Process Once Confined to One's Own Home Has Moved to the Laboratory and Mushroomed in Complexity, Leaving Parents-to-Be Both Hopeful and Confused"

74. Article in September 30, 1991 issue of Time entitled, "Making Babies - More Than a Million Couples Seek Treatment for Infertility Each Year"

75. Article in March 15, 1992 issue of New York Times Magazine entitled, "Tales from the Baby Factory"

76. Article from June 29, 1992 issue of Newsweek entitled, "Baby Makers Inc.: The In Vitro Fertilization Business is Taking Off. But is it Ripe for Abuse?"

77. Article in March 28, 1993 issue of The Virginian-Pilot and The Ledger-Star entitled, "Gamblers and Gametes - Infertile Couples Can Be Unwary Consumers"

78. Article in the December 1994 issue of U.S.News &

World Report entitled, "The Baby Chase: Millions of Couple Have Fertility Problems, and May Try High-Tech Remedies. But Who Minds the Pricey Clinics They Turn To?"

79. March 2, 1989 letter from Dr. George Gaunt to Dr. Emil Steinberger

80. April 18, 1989 letter from Dr. George Gaunt to Bill Ballenger

81. April 20, 1989 letter from Dr. George Gaunt to Dr. Gary Berger

82. April 21, 1989 letter from Dr. George Gaunt to Dr. Emil Steinberger

83. April 21, 1989 letter from Dr. George Gaunt to Dr. Ray King

84. April 25, 1989 letter from Dr. George Gaunt to Representative J. Alex McMillan

85. April 25, 1989 letter from Dr. George Gaunt to State Senator Fountain Odom

86. April 25, 1989 letter from Dr. George Gaunt to Ann L. Sayer

87. May 12, 1989 letter from Dr. George Gaunt to Representative Nick Jeralds

88. July 14, 1989 letter from Dr. George Gaunt to Dr. William C. Andrews

89. August 7, 1989 letter from Dr. Benjamin D. Younger to Dr. George Gaunt

90. August 11, 989 letter from Dr. William C. Andrews to Dr. George Gaunt

91. August 31, 1989 form letter from Dr. George Gaunt to various physicians

92. August 31, 1989 letter from Dr. George Gaunt to Dr. Ray King

93. August 31, 1989 letter from Dr. George Gaunt to Dr. Gary Berger

94. October 31, 1989 letter from Dr. George Gaunt to Dr. David Archer

95. December 11, 1989 letter from Dr. George Gaunt to Representative Ron Wyden

96. December 11, 1989 letter from Dr. George Gaunt to Dr. John D. Batjer

97. April 5, 1990 letter from Dr. George Gaunt to Representative J. Alex McMillan

98. January 3, 1991 letter from Dr. George Gaunt to Dr. Kamran S. Moghissi

99. April 26, 1991 letter from Dr. George Gaunt to Dr. Richard K. Kleppinger

100. April 26, 1991 letter from Bill Ballenger to Karen Garloch

101. May 6, 1991 letter from Dr. George Gaunt to Dr. Ray King

102. September 18, 1991 letter from Bill Ballenger to Dr. George Gaunt

Supreme Ct.
FILED
OFFICE OF THE CLERK

No. 01-69

IN THE

Supreme Court of the United States

GEORGE L. GAUNT and
THE CENTER FOR REPRODUCTIVE MEDICINE, P.A.,

Petitioners,

v.

DONALD E. PITTAWAY, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR and THE NALLE CLINIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

BRIEF IN OPPOSITION

LAWRENCE J. GOLDMAN
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Attorneys for Respondents

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169205

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STATEMENT PURSUANT TO RULE 29.6

The Nalle Clinic is a North Carolina corporation without a parent company and in which no publicly held company owns 10% or more of its stock.

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INTRODUCTION

The Petitioners' brief is a re-statement of the arguments that have been rejected by the Superior Court for Mecklenburg County North Carolina, the Court of Appeals of North Carolina twice and by the North Carolina Supreme Court on two separate occasions. As every opinion has been unanimous, petitioners' arguments, once applied to the appellate record, have failed to convince even one of the many judges who have decided the case.

No new legal issue is raised in the petition, no split in the circuit courts needs to be rectified. The undisputed facts that were presented during the pendency of this matter have been decided, unanimously, based on the application of well-settled case law.

Under Rule 14 of the Rules of the Supreme Court of the United States, it is required that a petitioner seeking review of a state-court judgment include a concise statement, including specific reference to:

> [T]he stage of the proceedings, both in the court of first instance and in the appellate courts when the federal questions sought to be reviewed were raised, the method or manner of raising them and the way in which they were passed on by those courts. . . .

(Rule 14)

No effort was made by the Petitioners to comply with Rule 14. The petition is silent when it comes to citations, specific or otherwise, of when any federal questions first

arose in this litigation which was decided under the defamation law of the State of North Carolina.

No Federal issue was raised in the Complaint or other pleadings filed with the court of first instance, nor was one raised in the Assignments of Error, which, under North Carolina Law, determine the scope of the issues on appeal.

Importantly, the courts in North Carolina resolved this matter on independent state grounds, leaving no substantive matters to be resolved under federal law and precluding review by this court under *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). Under North Carolina law " an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.' " *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435-36, 291 S.E.2d 852, 857 (1982), *appeal dismissed*, 307 N.C. 459, 298 S.E.2d 385 (1983).

While the court in Gaunt II[1] referred to federal cases in its analysis, it reaffirmed the North Carolina standard for a limited purpose public figure and held that "[w]e believe plaintiffs satisfied both the federal *and state* definitions of limited purpose public figures." 139 N.C. App. 778, 534 S.E.2d 660 (2000) (emphasis added) As the appellate courts of North Carolina have determined that the Petitioners are limited purpose public figures under state law, there is no legitimate interest in federal review.

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1. 139 N.C. App. 778, 534 S.E.2d 660 (2000) This was the second opinion issued by the North Carolina Court of Appeals.

STATEMENT OF THE CASE

This case arose out of an article entitled, " 'Miracle Baby' Attempts Raise Questions" (the "article") that was published in the Charlotte Observer newspaper on September 15, 1991. During the course of her research and investigation, the article's author, Karen Garloch, interviewed, among others, Defendant Donald E. Pittaway, MD., the head of the Reproductive Endocrinology section of the Bowman Gray Medical School. (Pittaway Aff. Para 4; T p. 011870) (Garloch Aff. Para. 31, 36-37, 57; T pp. 011227, 011231-011236, 011260.) In the article, Dr. Pittaway made several statements regarding his opinion of Dr. George L. Gaunt's training and experience in the field of *in vitro* fertilization. Pittaway also made statements to the effect that, in his opinion, Gaunt frequently ordered tests that were unnecessary and expensive. The Nalle Clinic defendants made similar statements.

Following the publication of the article on September 15, 1991, a complaint was filed in the Superior Court for Mecklenburg County. The complaint only identified statements that were set forth in the article. At the appellate stage, for the first time, and repeatedly in their Petition to this Court, the Petitioners refer to statements allegedly made by the respondents in their meetings with Garloch. Under settled North Carolina law, these statements, which were not set forth in the Complaint, should not be considered on appeal. *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 266 S.E.2d 861 (1980) Further, the statute of limitations on any alleged claims related to these "source statements" ran years ago. *Gibson v. Mutual Life Ins. Co.*, 121 N.C. App. 284, 465 S.E.2d 56 (1996).

With regard to the statements that were allegedly made, but not referenced in the Complaint, it should be noted that under North Carolina Rule of Civil Procedure 15, the petitioners had ample opportunity to move the court for leave to amend their complaint. Petitioners never sought to exercise this option and lost the opportunity to do so once the matter was resolved by the Trial Court at summary judgment. *Gladstein v. South Square Associates*, 39 N.C. App. 171, 177, 249 S.E.2d 827, 830 (1978). As any issues related to the statements not included in the article have been waived, they are not available for review under federal law.

Despite arguments to the contrary, no statements contained in the article refer to the plaintiffs as "criminals" and the only reference to "criminally predatory charlatans" is in the plaintiffs' petition to this Court.

The two main areas of opinions expressed in the article, the level of training and experience in the field of *in vitro* fertilization and the necessity of the testing at CRM, were explored during discovery. The Petitioners' own medical expert, Dr. Howard Jones, testified that CRM was the *only* IVF program in the country that had a medical director with no residency training. (Jones Dep. p. 309; T p. 010341; App. 1) He further admitted that in 1991, CRM did *not* meet the *minimum* standards for an IVF clinic as published by the American Fertility Society[2]. (Jones Dep. p. 365; T p. 01035; App. 2) Further, Gaunt's expert acknowledged that reasonable specialists could disagree with the appropriateness of Gaunt's testing practices. (Jones Dep. p. 561; T p. 01426; App. 3)

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2. Jones clarified "minimal standards" to mean "the very least someone should have in order to provide a program in *in vitro* fertilization." (Jones Dep. p. 288; T p. 010335, App. 4)

While the Petitioners, in their various appellate filings, have questioned the existence of a public debate, their own Public Relations agent, Bill Ballenger did not. He testified as follows:

> Q: One of the controversial issues that was very much in the public debate and with Congress and the North Carolina Legislature was whether clinics that did in vitro fertilization should have a reproductive endocrinologist of staff, is that correct?
>
> A: That's correct.
>
> Q: That's what you understood the controversy to be?
>
> A: That's the major controversy, yes.

(Ballenger Dep. p. 114; T p. 008320, App. 5)

Ballenger further acknowledged that the controversy "certainly was hot public debate, no doubt." (Ballenger Dep. p. 581, App. 6).

The record produced during discovery also established that Gaunt took the highly unusual step of hiring his own personal lobbyist, Stephen L. Meehan, to "assist them in having a portion of . . . legislation requiring clinics doing IVF treatment to have a reproductive endocrinologist on staff removed from the legislation. . . ." (Meehan Aff.; T p. 009523-24) There was no dispute that "Gaunt and [CRM] . . . actively participated in [the]controversy in order to influence the resolution of the issue of whether

reproductive clinics should be supervised or directed by reproductive endocrinologists." (Ballenger Dep. p. 516; App. 7) In fact, Gaunt personally summarized his involvement in the controversy by stating that he had "spent every spare moment trying to stop this lunacy." (T p. 009635-36)

Following extensive discovery, the Trial Court granted the defendants' motions to Dismiss the Unfair and Deceptive claims on May 10, 1994 (R p. 139). On July 25, 1995, the Trial Court granted the Respondents' motion for partial summary judgment and concluded that the Petitioners were limited purpose public figures. (R p. 158) Respondents then moved for summary judgment on petitioners' defamation claims. The court granted these motions in orders and judgments entered on June 24, 1997. (R p. 264)

Petitioners filed a notice of appeal (R p. 279, as amended) and on November 2, 1999, the North Carolina Court of Appeals issued an opinion affirming the Trial Court. (Gaunt I) The Petitioners sought and obtained a rehearing that resulted in a second opinion from the North Carolina Court of Appeals filed August 29, 2000. (Gaunt II) In unanimous opinions in both Gaunt I and Gaunt II, the Court of Appeals affirmed the Trial Court in all respects and further found, *inter alia* that: "[w]e believe plaintiffs satisfied both the federal and state definitions of limited purpose public figures." (Gaunt II, App. 30)

In so holding the court found not only that there was a controversy, but also that "Gaunt had thrust himself into the vortex of the controversy". (Gaunt II, App. 31)

The Court of Appeals also held that, "Our review of the record in this matter reveals that the statements made by the

defendants are statements of opinion affecting matters of public concern within the context of *Milkovich*." (Gaunt I, App. 18)

Finally, the Court held that "[A]ssuming *arguendo* that the defendants' statements were not matters of opinion, plaintiffs failed to show malice on the part of the defendants." (Gaunt I, App. 18)

The Petitioners, in a document dated October 3, 2000, sought review by the North Carolina Supreme Court. As a result of the unanimous decision by the Court of Appeals, pursuant to N.C. Gen. Stat. § 7A-30, the only ground for an appeal of right to the Supreme Court would be for a matter "which directly involves a substantial question arising under the Constitution of the United States or of this State." In the alternative, pursuant to N.C. Gen. Stat. § 7A-31, the Petitioners sought discretionary review by the North Carolina Supreme Court.

The Respondents filed a motion to dismiss the appeal for lack of a substantial constitutional question and also filed an opposition to the petition for discretionary review. On December 21, 2000, the North Carolina Supreme Court, in conference, granted the motion to dismiss the appeal for lack of a substantial constitutional question and denied the petition for discretionary review. As such, the Supreme Court of North Carolina determined that no substantial constitutional question was preserved for review.

The orders of the North Carolina Supreme Court were subsequently filed with the Court of Appeals and the case, it seemed, was resolved. However, the Petitioners filed a petition seeking discretionary review by the North Carolina

Supreme Court, which was denied in conference on April 5, 2001. Thereafter, petitioners submitted their Petition for Certiorari to this Court.

REASONS FOR DENYING THE WRIT

I. THE EVIDENCE SUPPORTED THE STATE COURT FINDING THAT GAUNT WAS A LIMITED PURPOSE PUBLIC FIGURE.

A. The Standard for Determining a Limited Purpose Public Figure Has Been Judicially Determined.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the United States Supreme Court held that plaintiffs who have voluntarily injected themselves into particular public controversies are to be classified as limited purpose public figures and thereby bear the burden of proving that the alleged defamatory statements were made with actual malice under *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

The inquiry for determining whether a defamation plaintiff is a limited purpose public figure is twofold: (1) was there a particular public controversy that gave rise to the alleged defamation; and (2) did the plaintiff thrust himself into the forefront of that particular public controversy in order to influence resolution of the issues so as to justify public figure status. *See Time, Inc. v. Firestone*, 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S. Ct. 2675, 61 L. Ed. 2d 411 (1979); *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157, 99 S. Ct. 2701, 61 L. Ed. 2d 450 (1979).

In the case of *Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 201 U.S. App. D.C. 301 (1980), *cert. denied,* 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980), the United States Court of Appeals for the D.C. Circuit addressed the standard of what amounted to a public controversy:

"A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects the general public or some segment of it in a general way." 627 F.2d at 1297, 201 U.S. App. D.C. at 311. Additionally, "the court can see if the press was covering the debate, reporting what people were saying and uncovering facts and theories to help the public formulate some judgment." 627 F.2d at 1297, 201 U.S. App. D.C. at 311.

Courts have often noted that one policy reason underlying the public figure standard is that public figures may have access to channels of effective communication. *Gertz*, *supra*; *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 708 (4th Cir.) Cir.), *en banc*, *cert. denied*, 501 U.S. 1212, 111 S. Ct. 2814, 115 L. Ed. 2d 986 (1991).

Under North Carolina law, an individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy. *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 291 S.E.2d 852 (1982), *appeal dismissed,* 307 N.C. 459, 298 S.E.2d 385 (1983).

B. There was a Public Controversy

A public controversy regarding infertility medicine, and primarily the qualifications necessary to practice infertility medicine, existed at the time of the alleged defamatory statements. Mainstream media publications including *Glamour*

Magazine, Time Magazine, U.S. News & World Report and *Business Week* had reported on the topic. (R p. 267 *et seq.*, Nos. 9 and 13, deposition of William Ballenger and documentary exhibits)[3]. Congressional hearings and/or proposed legislation regarding the topic had occurred at both the national and state levels. (R p. 266, No. 7, Exs. 30 and 31 to the deposition of Gaunt; R p. 271, No. 56). Petitioner's own public relations agent, William Ballenger, testified that this issue was one of "hot public debate" and he had discussed the public concern over the issue of proper credentials to practice *in vitro* fertilization many times with Petitioner Gaunt (R p. 267, No. 9 pp. 581-2 to deposition of William Ballenger).

In fact, as set forth above, the Petitioners' own witness, Mr. Ballenger recognized the existence of the public debate. (Ballenger Dep. p. 114; T p. 008320, App. 18.)

> Q: One of those controversial issues that was very much in the public debate and with Congress and the North Carolina legislature was whether clinics that did *in vitro* fertilization should have a reproductive endocrinologist on staff, is that correct?
>
> A: That's correct.

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3. *Time* (T pp. 009559-60, 009578, 009584-85, 009593-009600), *Newsweek* (T pp. 009570-71, 009609-10.), *Life* (T pp. 009561-69), *Glamour* (T pp. 009573-77.), *Forbes* (T pp. 009557-58.), *People* (T pp. 009550-56), *Business Week* (T p. 009582-83), *U.S. News & World Report* (T pp. 009579-80, 009618-24), *The New York Times* (T p. 009601-08), *The Wall Street Journal* (T p. 009572), *The Los Angeles Times* (T pp. 009586-92), and *The Virginian-Pilot* and *The Ledger-Star* (T pp. 009611-17).

Q: That's what you understood the controversy to be?

A: That's the major controversy, yes.

(T p. 008320; App. 18.)

As early as 1987, the medical community itself had addressed "consumer" issues regarding the possible exploitation of infertile couples, including the problem of unnecessary testing by doctors who were either improperly trained or exploitative. (T pp. 009485-89.) The Congressional subcommittee hearings which addressed some of these issues were entitled "Consumer Protection Issues Involving *In vitro* Fertilization Clinics." (T pp. 009492-009502.)

Debate on issues involving public health and consumer issues is certainly a matter of "public concern." In *Quantum Electronics Corp. v. Consumers Union of U.S., Inc.*, the district court specifically noted that a controversy involving a "significant public health issue," was the type of public controversy for which this doctrine was designed. 881 F. Supp. 753, 765 (D.R.I. 1995).

C. Gaunt Thrust Himself into the Public Controversy in an Effort to Affect its Outcome

In order to be considered a limited purpose public figure in an ongoing public controversy, "[t]he plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1297, 201 U.S. App. D.C. at 311 (1980), *cert. denied*, 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980).

It has been made clear that "those who attempt to affect the result of a particular controversy have assumed the risk that the press, in covering the controversy, will examine the major participants with a critical eye." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d at 1298, 201 U.S. App. D.C. at 312 (1980), *cert. denied*, 449 U.S. 898, 101 S. Ct. 266, 66 L. Ed. 2d 128 (1980).

The Petitioner actively and purposely injected himself into the controversy regarding appropriate standards for the practice of infertility medicine and *in vitro* fertilization with the express purpose of influencing its outcome.

Gaunt fought efforts of the American Fertility Society to establish and promote its recommended minimal standards for facilities providing IVF, apparently because CRM did *not* meet those minimal standards. Ironically, the minimal standards were drafted by the Petitioners' own expert witness, Howard Jones, who opined that CRM did not meet those standards:

> Q. [I]s it true that as of September 15, 1991, based on your knowledge, the Center for Reproductive Medicine did not meet the minimal standards as written?
>
> A. I think that's correct.

(Jones Dep. p. 365; App. 13.)

Petitioner appeared on various forms of local media[4], hired

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4. *The Charlotte Observer, the University of North Carolina at Charlotte News, North Carolina Magazine, Healthcare News, The Business Journal, Business North Carolina, Greensboro News* (Cont'd)

a public relations firm, scheduled new conferences and had media information kits provided to media outlets. (R p. 267 *et seq.*, Nos. 9 and 13, deposition of William Ballenger and documentary exhibits).

Gaunt undertook to influence the outcome of the controversy regarding the appropriate qualifications to practice infertility medicine by writing Rep. Wyden to argue his position. (T pp. 009663-009665; App. 25-27.) Gaunt also wrote to numerous other elected officials, including Congressman J. Alex McMillan (T p. 009638-41; App. 28-31), State Senator Fountain Odom (T p. 009642; App. 32-34), and State Representative Nick Jeralds, (T p. 009647; App. 35-36).

Gaunt personally contacted dozens of IVF programs and several organizations in an effort to affect the outcome of the debate[5] and drafted a form letter to various physicians in a continuing effort to affect legislation at the state and federal levels.

Additionally, he took the highly unusual step of hiring his own personal lobbyist, Stephen L. Meehan, to further his agenda. (Meehan Aff. ¶ 31; T p. 009521.) Meehan stated that he was hired to "assist them in having the portion of . . . legislation requiring clinics doing IVF treatment to have a

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& Record, Charlotte Magazine and the Charlotte area's radio and television stations. (T pp. 009333-37, 009349, 009379-81, 009396, 009397-98, 009401, 009411, 009419-21, 009422-28); (Ballenger Dep. at 40, 82; T pp. 008246, 008288; App.23-24.)

5. August 31, 1989 letter to Gary Berger, MD.

reproductive endocrinologist on staff removed from the legislation. . . ." (Meehan Aff.; T p. 009523-24.)

Gaunt not only solicited others to join in the effort,[6] he personally tried "to influence the legislation in North Carolina, . . . [and] attempt[ed] to influence it at the congressional level as well . . ." (Ballenger Dep. p. 561; App. 22) There can be no dispute that "Gaunt and [CRM] . . . actively participated in [the] controversy in order to influence the resolution of the issue of whether reproductive clinics should be supervised or directed by reproductive endocrinologists." (Ballenger Dep. p. 516; App. 21.) Perhaps Dr. Gaunt summarized it best when he wrote that he had "spent every spare moment trying to stop this lunacy." (T pp. 009635-36.)

Gaunt's activities far exceed those of other plaintiffs who have been found by the courts to be public figures. For example, the West Virginia Supreme Court held that a physician was a limited purpose public figure based on "the quantity of his letter writing to newspapers, professional journals and organizations, fellow physicians, and government officials regarding the controversy. . . ." *State ex rel. Suriano v. Gaughin*, 198 W. Va. 339, 480 S.E.2d 548, 558 (W. Va. 1996). *See Reuber, supra.*[7]

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6. *See* letters to Dr. Gary Berger, Emil Steinberger and I. Ray King, M.D. (T p. 009634, 009635-36, 009637.)

7. *See also McBride v. Merrell Dow and Pharmaceuticals, Inc.*, 613 F. Supp. 1349 (D.D.C. 1985), *aff'd in part, rev'd in part*, 800 F.2d 1208 (D.C. Cir. 1986) (doctor's testimony at a government

(Cont'd)

Courts have often noted that one policy reason underlying the public figure standard is that public figures may have access to channels of effective communication. *Gertz*, *supra*; *Reuber*, *supra*.

There is no question that Dr. Gaunt and CRM had ready access at all times to local media. Ballenger noted that even after the article was published, he felt the petitioners could have used their media contacts to reemphasize favorable opinions and information about Dr. Gaunt and CRM. (Ballenger Dep. pp. 517-525.) A telling indication of the lack of merit in the petitioners' claims, Ballenger testified that he had found nothing inaccurate in the article and neither Dr. Gaunt nor Barbara Fields suggested to him that there was anything inaccurate in the article. (Ballenger Dep. p. 110; T p. 008316; App. 37.)

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hearing on drug safety was sufficient to make him a public figure for purposes of that controversy); *Park v. Capital Cities Communications, Inc.*, 181 A.D.2d 192, 585 N.Y.S.2d 902 (N.Y.A.D.), *appeal dismissed*, 80 N.Y.2d 1022, 607 N.E.2d 815, 592 N.Y.S.2d 668 (1992), *leave to appeal dismissed in part, denied in part*, 81 N.Y.2d 879, 613 N.E.2d 961, 597 N.Y.S.2d 929 (1993) (doctor's appearance on local radio and television stations and invitations to local television stations to do broadcasts on outpatient cataract surgery performed in his office, was a limited purpose public figure); *Ferguson v. Watkins*, 448 So. 2d 271 (Miss. 1984) (emergency physicians, because they had become involved in the dispute over hospital emergency room issues, were limited purpose public figures); *Cera v. Gannett Company, Inc.*, 47 A.D.2d 797, 365 N.Y.S.2d 99 (N.Y.A.D. 1975) (plaintiff chiropractors were public figures in a debate concerning chiropractic medicine because they had presented their views on a local television broadcast).

II. THE ALLEGEDLY DEFAMATORY STATEMENTS AT ISSUE WERE OPINIONS WHICH DID NOT CONTAIN A PROVABLY FALSE FACTUAL CONNOTATION AND WERE NOT MADE WITH ACTUAL MALICE.

A. As North Carolina courts have not addressed whether statements which did not appear in the newspaper article were defamatory statements, this Court should decline jurisdiction.

As set forth above, petitioners identify a number of allegedly defamatory statements attributed to Respondents which did not appear in the article. Such statements were not alleged to be defamatory in Petitioners' complaint nor presented as defamatory statements to the trial court at the hearing on the motion for summary judgment.[8] The North Carolina Court of Appeals and North Carolina Supreme Court have not addressed whether such statements were defamatory or even whether they were properly preserved for appellate review.

Where the highest state court has failed to address a federal question, it is assumed that the omission was due to a lack of proper presentation in the state courts unless the aggrieved party can affirmatively show the contrary. In such a situation, this Court has considered itself without jurisdiction to consider such an issue. *Exxon Corp. v. Eagerton*, 462 U.S 176, 181 n.3, 103 S. Ct. 2296, 2300 n.3, 76 L. Ed. 2d 497 (1983).

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8. It should be noted that Counsel for petitioners have served only as appellate counsel for petitioners. Petitioners were represented by other counsel at the trial court level.

North Carolina appellate courts follow a similar rationale and will not ordinarily pass upon a constitutional question unless it affirmatively appears that such a question was raised and passed upon in the trial court. *State v. Cumber*, 280 N.C. 127, 185 S.E.2d 141 (1971). This rule would seem particularly applicable in defamation actions, where North Carolina plaintiffs are limited to those statements alleged with sufficient particularity in their complaint to allow the trial court to determine whether such statements were defamatory. *Stutts v. Duke Power Co., supra.*

This court should decline to exercise its jurisdiction to review statements which did not appear in the newspaper article and were not considered by the North Carolina courts. The only statements at issue were those which appeared in the newspaper article.

B. The statements were opinion which did not contain a provably false factual connotation.

Since *Gertz v. Robert Welch, Inc., supra*, it has been held that the First Amendment protects opinion speech:

> Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

In *Milkovich v. Lorain Journal Company*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990), this Court declined to explicitly provide additional constitutional protection for

opinion speech, reasoning that constitutional protection was already amply insured for statements of opinion relating to matters of public concern which do not contain a provably false factual connotation.

In the instant case, the statements attributed to respondents in the newspaper article generally concern: (1) the Petitioners' training and credentials to practice *in vitro* fertilization; and (2) whether the Petitioners performed unnecessary testing.

With respect to Petitioners' training and credentials, it is undisputed that Petitioners' training failed to comport with the American Fertility Society's minimal standards for *in vitro* fertilization, which required an individual with the experience and training required for board certification in reproductive endocrinology or an individual with equivalent training and experience.[9] Petitioners' own expert testified that Petitioners did not meet the American Fertility Society minimal standards.

With respect to testing, even the Petitioners' own expert medical witness testified that reasonable medical experts could question the number, cost, relevance and appropriateness of some of Petitioners' testing.

In cases similar to the instant case, courts have found allegedly defamatory statements to be constitutionally protected speech. In *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515 (W.D. Ok. 1992) statements regarding the qualifications

9. Petitioner Gaunt did not have a reproductive endocrinology fellowship. He had no obstetrics/gynecology residency. Instead petitioner Gaunt had completed less than one year of a three year laboratory medicine residency.

of the plastic surgeon plaintiff and potential harm to patients were held to be opinions and not purported actual verifiable statements of fact. In *Woodward v. Weiss*, 932 F. Supp. 723 (D.S.C. 1996), allegedly libelous statements that a physician's patients had received excessive and unnecessary treatment were constitutionally protected opinions.

C. The statements were not made with actual malice.

Actual malice has been defined as publication of a statement with knowledge that it was false or with reckless disregard as to whether or not it was false. *New York Times Co. v. Sullivan, supra.* Reckless disregard for truth or falsity "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, at 1325, 20 L. Ed. 2d 262 (1968). The reckless disregard standard is a subjective one. It requires more than a departure from reasonably prudent conduct. There must be sufficient evidence to permit the conclusion that the defendant entertained serious doubts as to the truth of his publication. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 655, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

The question whether the evidence is sufficient to support a finding of actual malice is a question of law. *Harte-Hanks Communications, Inc. v. Connaughton, supra.* In ruling on a motion for summary judgment, the trial court must consider the quantum and quality of proof necessary to support liability. In cases where the actual malice standard

applies, the trial court, at the summary judgment level, must determine whether a rational trier of fact could find actual malice by clear and convincing evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Petitioners failed to present any evidence, yet alone clear and convincing evidence, that the statements were made with serious doubts as to the truth of the publication. In fact, as discussed earlier, respondents' statements regarding Petitioners' training and credentials were consistent with the American Fertility Society minimal standards. The reasonableness of the statements regarding testing was confirmed by the Petitioners' own expert. As such, it was properly determined that no rational trier of fact could find clear and convincing evidence of actual malice.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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No. 01-69

In The
Supreme Court of the United States

GEORGE L. GAUNT and THE CENTER FOR REPRODUCTIVE MEDICINE, P.A.,
Petitioners,

vs.

DONALD E. PITTAWAY, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR and THE NALLE CLINIC,
Respondents.

Petition for a Writ of Certiorari to the North Carolina Court of Appeals

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3400

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INTRODUCTION

For reasons that are not accidental, respondents have, through their Brief in Opposition ("Brief"), virtually ignored the arguments made by petitioners in their Petition for Certiorari ("Petition"). Respondents have not, and indeed cannot, deny that the Record is replete with accusations that petitioner George L. Gaunt ("Dr. Gaunt") is a "child molester," a taker of "kickbacks," and so forth. See Supreme Court Rule 15(2) (requiring respondents to point out, in their Brief, any misstatements in the Petition). Instead, respondents spuriously claim that their unvarnished personal attacks should simply be brushed aside.

RESPONDENTS' PROCEDURAL ARGUMENTS ARE MERITLESS

Respondents begin their brief by raising several plainly ridiculous objections. Respondents first assert that petitioners have failed to identify "when the federal questions sought to be reviewed were raised." The very first interior page of petitioners' Petition, entitled "Questions Presented," plainly indicates that "federal" questions were raised by respondents in their motions for partial summary judgment and summary judgment. The Petition, at pages 5, 7, 14 and elsewhere, further describes where and how the issues presented were preserved for appeal.

Respondents then claim that "[n]o Federal issue was raised in the Complaint or other pleadings filed . . . nor was one raised in the Assignments of Error [to the North Carolina Court of Appeals]." Respondent Pittaway must have forgotten that his Answer stated, as his Seventh Defense, that "if any statements made by defendant were defamatory and otherwise actionable, such statements were protected by the constitutional First Amendment privilege inasmuch as plaintiffs are public figures . . . ." Rp. 167. Similarly, respondents Crain, Whitesides, Wing, and the

Nalle Clinic, all of whom appear to be suffering memory lapses, also claimed in their Answer that "plaintiffs by their activities and in particular their advertising had become public figures . . . and the statements attributed to these defendants were privileged under the First and Fourteenth Amendments to the United States Constitution." Rp. 125. Under North Carolina's civil rules, an Answer is most certainly a pleading. See N.C.R. Civ. P. 7(a).[1]

Respondents then contend, that insofar as the limited purpose public figure question is concerned, "the courts in North Carolina resolved this matter on independent state grounds . . . precluding review by this court under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L. Ed. 2d. 1201 (1983)." Brief at 2. The trial court's orders on the public figure issue were explicitly premised on federal constitutional grounds. See Petition, App. C at 19a-21a. The case cited by respondents on this score is Taylor v. Greensboro News Co., 57 N.C. App. 426, 435-36, 291 S.E.2d 852, 857 (1982), appeal dismissed, 307 N.C. 459, 298 S.E.2d 385 (1983). Respondents fail to reveal that the Gaunt II Court credits the Taylor decision as "adopting language of the United States Supreme Court in Curtis Publishing Co. [v. Butts, 388 U.S. 130 (1967)]." Gaunt II, 139 N.C. App. 778, 786, 534 S.E.2d 660, 665 (2000).[2] More incredibly, at page 3 of

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1 And, despite respondents' contrary representation to this Court, petitioners' Fifth Assignment of Error to the North Carolina Court of Appeals plainly stated "that the Court improperly applied the law to the relevant, admissible and material facts concerning the public figure issue." Rp. 326. Petitioners' Sixth Assignment of Error addressed "constitutional [actual] malice." Rp. 327. Respondents have simply misrepresented these matters to this Court.

2 Respondents also fail to reveal that Taylor relied exclusively on opinions of this Court to ultimately conclude that the "New York Times standard of liability clearly applied to plaintiff." Taylor, 57 N.C. App. at

their Brief, respondents contend that the "statements allegedly made by the respondents in their meetings with Garloch . . . which were not set forth in the Complaint, should not be considered on appeal." (Citing Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980)). The order which granted partial summary judgment to respondents reveals that the trial court considered "the affidavits filed on behalf of the plaintiffs and defendants, the discovery responses and deposition transcripts filed with the Court." Petition, App. C at 19a-21a. The materials before the trial court contained all of the statements discussed in both parties' briefs to this Court.

Stutts, the case cited by respondents in their effort to have this Court disregard inconvenient evidence, concerned the standards applicable to a motion to dismiss, not those applicable to summary judgment. Stutts, 47 N.C. App. at 84, 266 S.E.2d at 866. The public figure question at issue was decided at summary judgment, through a test of the evidence, not the Complaint. And, to state the obvious, many of the statements made by respondents to The Charlotte Observer were unknown until discovery began. Once the notes of reporter Garloch were produced in discovery (quoting respondents in hundreds of pages of interviews), summary judgment became a test of that evidence. See N.C.R. Civ. P. 56(c). [3]

435-36, 291 S.E.2d at 857. In addition, it is noteworthy that a nearly identical "adequate and independent state grounds" argument was summarily rejected in Milkovich v. Lorain Journal Co., 497 U.S. 1, 9-10 n.5 (1990).

3 Cf. Whitten v. King's AMC/Jeep, Inc., 292 N.C. 84, 90, 231 S.E.2d 891, 894 (1977)(at summary judgment, it is desirable to treat the complaint as though it were amended to conform to the evidence presented at the hearing); Hardison v. Williams, 21 N.C. App. 670, 673, 205 S.E. 2d 551, 553 (1974) ("[t]o grant summary judgment for variance

THE LOWER COURTS HAVE IMPROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD.

The court in Harris v. Tomczak, 94 F.R.D. 687, 692 (E.D. Cal. 1982) described jurisdictions nationwide as "in profound disarray" about the proper application of summary judgment standards to the limited purpose public figure determination. Too often the determination of limited purpose public figure status has become a docket clearing mechanism achieved through the lazy application of First Amendment principles. Petitioners submit that this is exactly what occurred here.

Even accepting that a public controversy existed regarding "infertility medicine" in general, or "infertility credentials" specifically, these issues had no plausible connection to accusations such as "child molester." At pages 12-13 (footnote 4) of their Brief, respondents cite the Court to several occasions where Dr. Gaunt appeared in the local Charlotte media. Respondents do not inform the Court, though, that no "credentials" debate was ever raised by anyone during these appearances. The University of North Carolina at Charlotte News article cited by respondents is reproduced at Appendix page 19a; as this Court can observe, the article depicts Dr. Gaunt presenting a $300 scholarship to a local nursing student. The Greensboro News and Record article cited by respondents doesn't even mention Dr.

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between allegation and proof would subvert Rule 15(b) of the North Carolina Rules of Civil Procedure"). In sum, it is beyond dispute that the entirety of the Record was required to be and was considered by the trial court. The point of this appeal is that the lower courts improperly applied summary judgment standards and failed to properly account for the evidence in the Record.

Gaunt.[4] Respondents have merely lumped together every occasion where Dr. Gaunt wrote a letter to the editor, appeared on a call-in radio show or discussed the successes of his clinic with the local newspaper. Respondents have not demonstrated that Dr. Gaunt's media appearances were even tangentially connected to a so-called "infertility controversy." Respondents have not made the attempt because it could not be made in good faith. Instead respondents cite a vague list and call it probative of the matter at hand. It is not.

MATERIAL DISPUTES EXIST PRECLUDING SUMMARY JUDGMENT

Respondents' historical approach toward presenting the Record to the lower courts has worked well enough that it has continued here unabated. In their effort here, respondents assert that petitioners' own expert, Howard Jones, M.D. ("Dr. Jones"), claimed that Dr. Gaunt and his clinic did not meet the minimal standards of a fertility practitioner. See Brief, p. 12. In fact the opposite is true.[5]

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4 Each of the articles or media appearances cited by respondents suffers from identical analytical defects. At Appendix pages 12a-19a, other examples of respondents' partial summary judgment evidence is reproduced.

5 Dr. Jones actually testified as follows:

> Q. And let me ask you this last question relating to that. Do you have an opinion, Doctor Jones, as to whether Dr. Gaunt in 1986-1991 had the medical training to make decisions on the course of treatment for infertility patients under his care at the Center for Reproductive Medicine?
>
> A. Yes, Sir.
>
> Q. And the basis for that opinion?

Likewise, respondents have also made the startling assertion that petitioner's former public relations agent, William Ballenger, testified that "he found nothing inaccurate in the article." Brief, p. 15. In fact, he testified to the exact opposite.[6] These factual disagreements matter, of course, because the case was dismissed through summary judgment. If the basic facts presented at summary judgment conflict so unequivocally, dismissal could not have been proper.

Insofar as the public figure question is concerned, the following things can be flatly said. Dr. Gaunt never appeared in any public forum to argue about the validity of his credentials, and his efforts to track certain legislative efforts received no public attention whatsoever.[7] These

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A. Would be the same as I have answered the other similar questions.

(Jones dep. pp. 263-64; Rp. 275.)

6 William Ballenger actually testified as follows:

Q. And what would that impression [of the Story] be, in your view?

A. That impression would be that the Center was not good at what it did, and, in fact, was damaging to some people, that most would be just like these that are depicted over three columns of page 1.

Q. Did you feel that was incorrect?

A. I did.

(Ballenger dep. p. 277; Rp. 267.)

7 Respondents contend that "Gaunt's activities far exceed those of other plaintiffs . . . found by the Courts to be public figures." Brief, p. 14. The cases cited by respondents in support of this argument are, however, patently inapposite. In Suriano v. Gaughan, 198 W.Va 339, 347 n.10, 480

assertions were made in the Petition, and respondents have not disputed them.

In their Brief, at page 10, respondents point this Court to numerous publications they claim established an infertility controversy as of the date of the Story, i.e., September 15, 1991. None of these articles mention petitioners, and no less than six of the publications cited by respondents post-date September 15, 1991 (one by three years). This important information was omitted from respondents' arguments.[8] Again, though, respondents have

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S.E.2d 548, 557 n.10 (1996), for instance, the plaintiff's writings about the controversy had been published in newspapers and medical journals. None of Dr. Gaunt's letters to legislators and the like were ever seen by anyone other than their recipients. Dr. Gaunt's two letters to the editor of The Charlotte Observer, the only letters ever published, put forward by respondent's as evidence, were entitled "Right To Smoke Harms Others" and "Reproductive Morality - Perhaps God Works Through Modern Medicine." Neither addressed credentials issues at all. Likewise, Dr. Gaunt has never provided any testimony to any governmental body, ever. Thus, McBride v. Merrell Dow and Pharmaceuticals, Inc., 613 F.Supp. 1349, 1353-34 (D.D.C. 1985) aff'd in part, rev'd in part, 800 F.2d,1208 (D.C. Cir. 1986), is malapropos, since the plaintiff there testified before governmental hearings as an expert on the controversy at issue, and was a public figure as a result. In Park v. Capital Cities, 181 A.D.2d 192, 194 (N.Y. Sup. Ct. 1992), the controversy was about cataract surgery and the plaintiff doctor had asked television stations to do a broadcast on that very topic. And, in Cera v. Gannett Co., Inc., 47 A.D. 2d 797 (N.Y. Sup. Ct. 1975), the plaintiffs "concede[d] that they had thrust themselves to the forefront of the particular public controversy." Needless to say, the instant petitioners conceded nothing of the sort. The discordance between the cases cited by respondents and the facts of the instant case highlight the infirmity of the limited purpose public figure determination made below.

8 Los Angeles Times (Ep. 9586-92) date of publication October 6, 1991; Time (Ep. 9593-9600) date of publication September 30, 1991; New York Times (Ep. 9601-08) date of publication March 15, 1992; Newsweek (Ep. 9609-10) date of publication June 29, 1992; The Virginia-Pilot and The Ledger-Star (Ep. 9611-17) date of publication March 28, 1993; U.S. News

BEST AVAILABLE COPY

merely selected examples of media coverage, and listed them *ad nauseam*, as if their mere existence proves the contours of a relevant controversy. The Gaunt II Court echoed the error, stating that these publications established "an important public controversy . . . at the time of The Charlotte Observer news article." Gaunt II, 139 N.C. App. at 786, 534 S.E.2d at 665. The facts of record do not square with this assertion. Such errors solidify the proposition that no careful review of the Record occurred below, and that summary judgment standards were either misunderstood or improperly applied.

THE ACTUAL MALICE STANDARD WAS IMPROPERLY APPLIED AT SUMMARY JUDGMENT

This Court has defined actual malice in First Amendment cases as publication of a statement with knowledge that it was false or with reckless disregard as to whether it was false. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). The Court has made clear that the defendant must have made the false publication "with a high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or must have entertained serious doubts as to the truth of its publication. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

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and World Report (Ep. 9618-24) date of publication December 5, 1994. See Petition, App. E at 35a–44a, for a list of the evidence before the trial court on the public figure question.

The record is replete with evidence showing "actual malice" on the part of the respondents.[9] Reporter Garloch's notes document that respondent Crain told her that Dr. Gaunt "never graduated." App. at 1a. At his deposition, though, respondent Crain first denied the statement and then admitted that he had seen Dr. Gaunt's diploma on the wall. Respondent Crain also told reporter Garloch that Dr. Gaunt had been "kicked out of [a] path[ology] resid[ency] at the Mayo Clinic." App. at 7a, 6a. Reporter Garloch confirmed for herself that this accusation was false. Id.

These comments pale in comparison to the criminal acts respondents alleged that Dr. Gaunt committed. Respondent Crain told reporter Garloch that Dr. Gaunt was responsible for a "dead cat" and that he was a "child molester." App. at 1a. Respondent Crain also called Dr. Gaunt the "Jim Bakker of medicine" and an "absolute criminal." App. at 8a-9a. Yet, when asked under oath if he had told reporter Garloch that Dr. Gaunt had engaged in any criminal activity or fraud, respondent Crain both denied making such a claim and then stated that he could not recall having done so. App. at 3a-5a. Importantly, when asked, respondent Crain could not assert that these statements were true.

In Harte-Hanks, this Court held that "[a]lthough courts must be careful not to place too much reliance on such factors [like motive], a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." 491 U.S. at 668. In the present case, respondents Crain, Pittaway, Wing and Whitesides were in direct competition with petitioners. Like the defendants in Harte-Hanks, the respondents here directly benefitted from impugning the

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9 Reproductions of some of this evidence are contained at Appendix pages 1a-19a of this Reply.

reputation of Dr. Gaunt. Respondents Crain, Pittaway, Wing and Whitesides were either reproductive endocrinologists or were seeking that certification. A review of the Record indicates an ongoing "turf battle" between reproductive endocrinologists and anyone else attempting to practice in the field of in-vitro fertilization. Consequently, respondents were clearly biased in favor of their specialization and were bitter rivals against their cross-town competition, Dr. Gaunt, a doctor who was not identically credentialed.

CONCLUSION

Respondents adjure this Court to grant this Petition for a Writ of Certiorari to correct the North Carolina courts' errant application of the law. Under Gertz, respondents cannot be limited purpose public figures. Even if this Court were to conclude that respondents were limited purpose public figures under Gertz as to a particular public controversy, it would then have to affirm the lower courts' holdings that statements such as "child molester," "absolute criminal," "getting kickbacks," "fraud," and "churning blood studies for economic reasons," were non-actionable matters of "opinion."

This case presents an opportunity for this Court to uphold a citizen's ability to defend his name and reputation, things difficult to restore. The lower courts would benefit from this Court's guidance regarding the proper application of the summary judgment standard under Gertz, Milkovich, and New York Times. If these respondents are allowed to utter, in the name of "opinion" and constitutional privilege, such vile and repugnant falsehoods as have occurred here, then all citizens who embark to further their professions or businesses are in harm's way.

Respectfully submitted, this the 14th day of September, 2001.

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* Counsel of Record

September 14, 2001

Excerpts of Written Notes taken by Reporter Karen Garloch during 12/10/90 interview with Respondent Jack L. Crain regarding Dr. George Gaunt.

(From Appellate Record, Ep. 011453)

Crain 12-10-90

* * *

not very emotionally sound

dead cat - noose around its neck

letters to neighbors - child molester

been to police 86
This man is nuts
Now, I don't know what he does now -
police -
complaint on file

airport - totally glued shut -
daughter - card - man in tower
w/noose around neck
stick on letters -

its all died down -
he can still survive without me -

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cont' next page

Excerpts of Written Notes taken by Reporter Karen Garloch during 12/10/90 interview with Respondent Jack L. Crain regarding Dr. George Gaunt con't.

(From Appellate Record, Ep. 011453)

Dick & Gaunt - in 83 -
George's credentials -
incredible how he
engineered the system
to be open
had I known - I wouldn't be in Charlotte

* * *

he had run the Mercy Hospital regular
clinical lab -
never mentioned that he never
graduated -
been to Yale
been to Mayo -

* * *

Excerpts from Deposition of Respondent Jack L. Crain

(Appellate Rp. 266)

CRAIN 498

Q. Did you ever tell Karen Garloch that Dr. Gaunt was engaging in any criminal activity?

A. I don't know how to answer that question. I know of no accused criminal activity that has occurred.

Q. Did you ever tell her that Dr. Gaunt was engaging in any criminal activity?

(WHEREUPON, the witness conferred with Mr. Hewson off the record.)

MR. BATCHELER: The witness is conferring with his counsel.

MR. HEWSON: Yes. He says he doesn't know how to answer that.

MR. BATCHELER: He can answer yes or no. That would be one way or two ways.

MR. HEWSON: Well, thank you for that logical contribution to our -

THE WITNESS: Deliberations

MR. HEWSON: - human experience.

Excerpts from Deposition of Respondent Jack L. Crain

(Appellate Rp. 266)

CRAIN 498 cont'

Q. The question was did you tell Karen Garloch that Dr. Gaunt was engaging in any criminal activity?

A. After I left Dr. Gaunt's facility there were things that happened in my family's life that made me concerned that there may be some steps beyond the bounds of what's legal.

Excerpts from Deposition of Respondent Jack L. Crain

(Appellate Rp. 266)

CRAIN 499

Q. Did you tell Karen Garloch that Dr. Gaunt was engaged in any criminal activity?

A. I don't know the answer to that.

Q. You don't recall whether you did or not?

A. I don't know.

Q. Did you tell Karen Garloch that Dr. Gaunt at the Center for Reproductive Medicine committed any insurance fraud?

A. I don't think so. I don't believe her newspaper article said that, did it?

Q. I'm just asking whether you ever told her such a thing.

A. No.

* * *

Excerpts from Deposition of Reporter Karen Garloch

(Appellate Rp. 266; Ep. 1049)

GARLOCH 336

A. You've seen in my notes that Dr. Crain had heard that [Dr. Gaunt] had been kicked out. I'm sure - - I don't know - I think I probably addressed that with Dr. Gaunt. I think that - - I mean, I didn't ever find that that was true.

Q. Did you try to find out whether it was true?

A. I did by calling the Mayo and talking to Dr. Gaunt. I never found that that was true.

* * *

Excerpts from Deposition of Reporter Karen Garloch

(Appellate Rp. 266; Ep. 1705)

GARLOCH 838-839

Q. Did you ever have any telephone conversations with Dr. Crain?

A. Yes.

Q. Looking on page CO 01112, I see the words didn't - and you tell me whether I'm reading them properly, would you? Didn't do anything after med school, kicked out of path residency in Mayo, is that a fair reflection of what you wrote?

A. Yes.

Q. Did Dr. Crain tell you that Dr. Gaunt had not done anything after medical school and had been kicked out of pathology residency at the Mayo Clinic?

A. My notes speak for themselves. That was our conversation.

* * *

Q. The second line from the bottom, it says he's cheating people. Did Dr. Crain tell you that Dr. Gaunt was cheating people?

A. That's what my notes say.

Excerpts from Deposition of Reporter Karen Garloch

(Appellate Rp. 266; Ep. 1049)

GARLOCH 844-845

* * *

Q. About two inches further down on the page there's a line which I'll read.

"He's the Jim Bakker of medicine."

"the guy is an absolute crim. . ."

Did Dr. Crain tell you that Dr. Gaunt was the Jim Bakker of medicine?

A. Yes.

Q. What did you understand he meant by that?

A. I don't know if I had an understanding further than what this says.

Q. Is Jim Bakker known for any particular characteristic in this town?

A. Jim Bakker used to be a religious leader in this town.

Q. Was Dr. Crain saying that Dr. Gaunt was the religious leader of medicine?

A. No. I don't know what he was saying.

Excerpts from Deposition of Reporter Karen Garloch

(Appellate Rp. 266; Ep. 1049)

GARLOCH 844-845 cont'

Q. Was Jim Bakker known for anything else in this town?

A. He's known for a lot of things. I don't know which one you want me to say.

Q. When somebody would call somebody the Jim Bakker of medicine, what do you understand by that?

MR. BUCHAN: I'm going to object to that. She's answered the question.

A. I didn't have a real good understanding of what he meant.

Q. Would it be a complimentary term to be the Jim Bakker of medicine or a derogatory term or a neutral term?

A. I don't think it would be complimentary.

Q. Would it be derogatory?

A. Yeah.

Excerpt from Affidavit of Karen Garloch

(Affidavit Rp. 276, Ep. 11223)

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* * *

26. In that conversation, Dr. Crain also told me that he understood Dr. Richard Wing and Dr. Daniel Whitesides had each treated former patients of Dr. Gaunt and CRM. He said Dr. Wing and Dr. Whitesides had informed him in each case that they believed Dr. Gaunt and CRM had failed to properly diagnose significant medical problems. Dr. Wing's case involved a large endometrioma, and Dr. Whitesides' case involved a large tumor, Dr. Crain told me. Dr. Crain said that while he was employed at CRM, Dr. Gaunt had often held him out to patients to be the person who made "clinical decisions" regarding patient care because Dr. Crain was a gynecologist with additional training in reproductive endocrinology. But in reality, Dr. Crain said, it was Dr. Gaunt who made most of the clinical decisions regarding patient care, testing and diagnosis of

Excerpt from Affidavit of Karen Garloch Cont'

(Affidavit Rp. 276, Ep. 11223)

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infertility and treatment options. Dr. Crain raised serious questions about Dr. Gaunt's honesty and about the quality of care Dr. Gaunt provided. Because Dr. Crain had actually worked at CRM for two years and had witnessed Dr. Gaunt's medical practice firsthand, he appeared to be a credible observer of CRM and Dr. Gaunt. I also knew, based on my three years of experience as *The Charlotte Observer's* medical reporter, that Dr. Crain, Dr. Wing and Dr. Whitesides were physicians who were well respected by their peers in the Charlotte medical community.

(Appellate Rp. 270)

(This Exhibit is listed as Exhibit No. 48 at App. E, p. 39a of the Petition)

CAROLINA
PR/Marketing
Carolina Public Relations/Marketing, Inc.
908 South Tryon Street, Suite 2200
Charlotte, North Carolina 28202
704/332-2030 * FAX 704/332-2945

I N V O I C E

#3392

February 28, 1990

Dr. George Gaunt
Center for Reproductive Medicine
2034 Randolph Road
Charlotte, NC 28207

For Professional Services during the Month of February, 1990: $960.00

For planning, research, counsel and media contact to publicize arrival of Cambodian triplets, including production of media release rough.

For Reimbursable Expenses:

Clerical services	$105.00
Copies	3.00

(continued to next page)

(Appellate Rp. 270)

(This Exhibit is listed as Exhibit No. 48 at App. E, p. 39a of the Petition)

Postage	1.20	
Telephone	7.00	116.20
TOTAL AMOUNT DUE:		$1,076.20

Ep. 0009452

(Appellate Rp. 270)

(This Exhibit is listed as Exhibit No. 50 at App. E, p. 40a of the Petition)

CAROLINA
PR/Marketing
Carolina Public Relations/Marketing, Inc.

908 South Tryon Street, Suite 2200
Charlotte, North Carolina 28202
704/332-2030 * FAX 704/332-2945

I N V O I C E

#3484

April 30, 1990

Dr. George Gaunt
Center for Reproductive Medicine
2034 Randolph Road
Charlotte, NC 28207

For research, development of primary media rough, research with National Chestnut Foundation, and discussions with management, real estate agent, and research in special real estate interests relevant to historic properties. $1,500.00

Clerical services	$15.00
Copies	.80

(continued to next page)

(Appellate Rp. 270)

(This Exhibit is listed as Exhibit No. 50 at App. E, p. 40a of the Petition)

Postage	.25	16.05
TOTAL AMOUNT DUE:		$1,516.05

/ep

Ep. 009454

Press Release

(Appellate Rp. 268)

(This Exhibit is listed as Exhibit No. 14 at App. E, p. 36a of the Petition)

(Symbol) Center For Reproductive Medicine
2034 Randolph Road, Charlotte, NC 28207

MEDIA CONFERENCE ANNOUNCEMENT

WHAT?	A media conference to announce the birth of a child to a Waxhaw woman who had been voluntarily sterilized.
WHEN?	Wednesday, March 15, at 2 P.M.
WHERE?	At the third floor offices of The Center For Reproductive Medicine at 2034 Randolph Road in Charlotte, N.C.
WHY?	To let women who have been sterilized via tubal ligation (tied tubes) know that in many cases childbirth is possible in the event they change their minds (this is true in many cases, particularly when the woman remarries).
HOW?	Using IVF procedures (in-vitro fertilization) and the new, ultrasound technique.

(continued to next page)

Press Release

(Appellate Rp. 268)

(This Exhibit is listed as Exhibit No. 14 at App. E, p. 36a of the Petition)

SPECIAL ANGLE:

The couple makes its living in the poultry and livestock breeding business. They were able to finance the relatively costly procedure through the sale of prize breeding bulls.

NOTE: Testing, fertilization, patient care, and birth all took place in Mecklenburg County. The child, a boy, weighed over nine pounds and is in perfect health. The birth is the fifth IVF success for the clinic in the past 10 months.

For additional information, contact: Bill Ballenger
(704) 332-2030

Advertisement

(Appellate Rp. 269)

(This Exhibit is listed as Exhibit No. 29 at App. E, p. 38a of the Petition)

In Recognition of
NATIONAL INFERTILITY AWARENESS WEEK

THE CENTER FOR REPRODUCTIVE MEDICINE
Reaffirms
The Commitment to Excellence in The Resolution of Infertility

The Center for Reproductive Medicine provides a unique concept in the care of infertile couples. Our team of doctors, nurses, scientists, and psychologists is devoted exclusively to couple oriented infertility care with an emphasis on patient education and the emotional aspects of infertility. We have Charlotte's only successful comprehensive *in vitro* fertilization program and full-service infertility laboratory that is accredited by the College of American Pathologists. If you would like information to help you understand recent technological advances in infertility, please feel free to call us for information, care or referral.

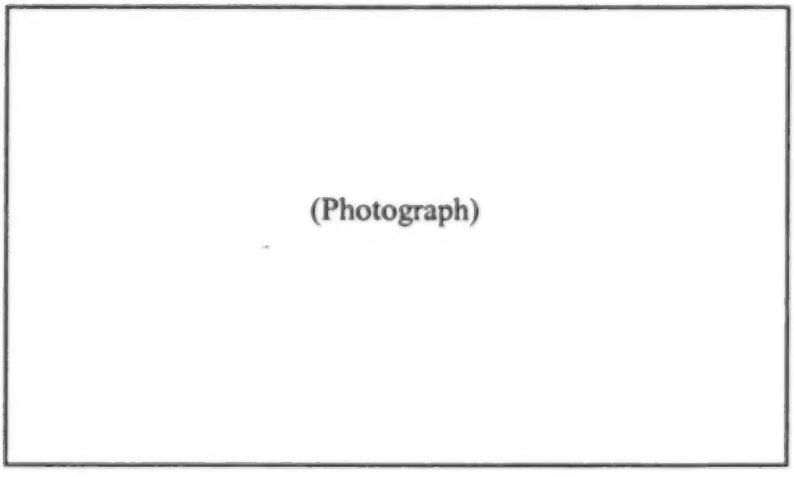
(The Center For Reporductive Medicine symbol)

2034 Randolph Road • Charlotte, NC 28207 • (704) 372-4600 • 1-800-843-6098

Photograph and Caption of Dr. George Gaunt, Barbara Fielding and Nursing Dean Nancy Langston in Winter, 1986 Edition of the University of North Carolina's Charlotte News

(Appellate Rp. 267)

(This Exhibit is listed as Exhibit 5 at App. E, p. 35a of the Petition)



Scholarship Funds For Nursing

Dr. George Gaunt (center) presents College of Nursing Dean Nancy Langston with a check from the Charlotte Center for Reproductive Medicine. At right is Barbara Fielding, also of the Center. The contribution will provide $300 in scholarship funds for a nursing student each semester.